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**THE LAW OF ECOSYSTEM RESTORATION FOR COMMUNITY
CONSERVATION GROUPS**

A thesis
submitted in fulfilment
of the requirements for the degree
of

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at

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by

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ABSTRACT

Across New Zealand communities have identified the need to restore and rehabilitate damaged ecosystems in their locality. However, community conservation groups (CCGs) often face significant obstacles when undertaking activities to restore and rehabilitate ecosystems. Activities carried out by CCGs require the people managing them to have an understanding of a plethora of different regulatory and legislative instruments, such as regional and district plans, corporate law, health and safety legislation, and employment law. The land use regulation that applies to a particular restoration site also has the potential to significantly affect how effective a CCG can be by either restraining the impacts on the land by neighbouring land use practices that impact negatively on the site, or by creating a legal environment that facilitates legal protection for significant conservation areas and prevents development. All of these factors, and a large number of others, require CCG to have an understanding of the law.

Many of the issues that CCGs face have not been dealt with adequately in legal writing in the past and are not well understood. Therefore further research and writing is necessary in this area to help CCGs undertake their work with minimal legal obstacles. To help address this gap this research paper will evaluate some of the main legal issues faced by CCGs and determine how these issues can be resolved by answering the question:

What are the main legal barriers faced by Community Conservation Groups (CCGs) when undertaking ecosystem restoration projects and how can these barriers be removed effectively?

To answer this question the two main methods of research that have been used are literature analysis and review, and semi-structured interviews with a range of CCGs and other organisations involved in ecosystem restoration. There are two main topics covered in this paper. Firstly, corporate issues for CCGs and secondly, land management issues for CCGs.

PREFACE

This research is one of a number of research projects being undertaken as part of a larger study currently underway at the University of Waikato which is focusing on the restoration of urban ecosystems, and is being led by Professor Bruce Clarkson. My research has been funded by the Foundation for Research Science and Technology (FRST) through an objective based investment (OBI) scheme which required me to determine what legal barriers are faced when carrying out community restoration projects and to identify possible solutions to these barriers.¹

A major component of this research has been the use of semi-structured interviews. Prior to beginning the interview process it was necessary to apply to the School of Law Ethics Committee for approval to undertake research using human subjects. This process involved forming an outline of the research process, explaining the reasons for the research, and declaring how I would manage issues surrounding cultural sensitivities, informed consent, and privacy and confidentiality. I was required to formulate a letter, explaining the research, which could be given to those who participated, and to create a consent form for participants to sign before beginning interviews. Each interviewee has read my introductory letter, had any queries explained, and signed a consent form so that informed consent has been obtained before interviewing commences. Comments made by interviewees on an off the record basis have not been referred to in my research in any way that can be attributed to that person.

I am aware of much good restoration activity for coastal and marine areas but the main focus of this thesis will be on terrestrial ecosystems. I would also like to point out that due to the limited scope of this paper a number of issues that were raised by interviewees are not mentioned in order to maintain focus on the key issues identified in the literature and through the interviewing process.

¹ University of Waikato, *OBI project outline* (2006) 1.

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I must also say a special thank you to all of my family and friends, especially my Mother, Margaret Ewing, Father, Robert Ewing, Brother, Grant Ewing, and my fiancé, Ryan Dawson, who have been so supportive throughout my studies. Their encouragement has helped to stay inspired throughout this research and to overcome any challenges as they have arisen. I could not have done this without you.

Finally I would like to offer my sincere thanks to Professor Barry Barton for the contribution that he has made to this paper and the feedback that he has provided on numerous drafts. His guidance and advice has greatly contributed to the success of this research. I will be forever grateful.

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PART ONE: THE LAW OF ECOSYSTEM RESTORATION FOR COMMUNITY CONSERVATION GROUPS

A. Introduction

Aotearoa / New Zealand is a land of unique biodiversity and magnificent landscapes not present anywhere else in the world. Images of New Zealand's environment are a major element of how New Zealand is marketed on an international scale and contribute significantly to the New Zealand economy. However as a result of human impacts on the environment many of New Zealand's distinctive and delicate ecosystems are in a state of decline and require human intervention if important species of flora and fauna are to be maintained. Communities across the country have identified the need for intervention and have banded together to restore and rehabilitate damaged ecosystems in their locality. Much of the work that these groups are doing is to fill in the gaps where government agencies have been unable to take action. This work is essential as at present the Department of Conservation, the government department with the responsibility of managing New Zealand's large conservation estate, only has enough funding to adequately manage approximately five percent of the land that it administers.²

However, community conservation groups (CCGs) often face significant obstacles when undertaking activities to restore and rehabilitate ecosystems. A number of these obstacles arise in relation to law. Activities carried out by CCGs require the people managing them to have an understanding of a plethora of different regulatory and legislative instruments, such as regional and district plans, corporate law, health and safety legislation, and employment law. Environmental law also plays a significant role in restoration projects and depending on the laws enacted may either facilitate or restrain restoration efforts. For example, the land use classification of a restoration site has the potential to significantly affect how successful a CCG can be by either restraining the impacts that neighbouring land use practices that impact negatively on

² J. Craig, S. Anderson, M. Clout, B. Creese, N. Mitchell, J. Ogden, M. Roberts, and G. Ussher, "Conservation Issues in New Zealand" (2000) 31 *Annu. Rev. Ecol. Syst.* 61, 62.

the site may have, or creating a legal environment that facilitates protection and prevents development.

Many of the issues that CCGs face have not previously been dealt with adequately in legal writing in a context that is useful for conservation groups working at the community level. Therefore increased research and writing is necessary in this area in order to gain a greater understanding in what has been a little appraised area of the law and to help CCGs undertake their work with minimal legal obstacles. This thesis will help to address some of the main legal issues faced by CCGs and determine how these issues can be resolved by answering the question:

What are the main legal barriers faced by Community Conservation Groups (CCGs) when undertaking ecosystem restoration projects and how can these barriers be removed effectively?

To answer this question there are two major topics that this paper focuses on; (1) corporate issues for CCGs; and (2) land management issues for CCGs. These topics are the two areas that my research has identified as requiring the most substantial investigation. In the remainder of Part One I will introduce the concept of ecosystem restoration and the role of CCGs in restoration projects to provide the reader with a basis for understanding the significance of this research project. This leads to an explanation of how CCGs fit within civil society to provide the theoretical framework within which this research is grounded. Part Two evaluates the increasing impact of corporate law on CCGs. Two necessary components of this part are a critical evaluation of the main corporate structures used by CCGs and an assessment of how the law on conflicts of interest impinges upon members of CCGs in their varying work and voluntary roles. Part Three leads into an evaluation of the main land management issues affecting CCGs. In this part I also appraise some of the approaches that have been used overseas, and I put forward suggestions as to how some of these measures could be suitably applied in New Zealand. Finally in Part Four I will sum up my research findings and draw conclusions about the way that the law affects how successful a CCG can be in restoring indigenous ecosystems and

how New Zealand's legislative framework could be improved to help facilitate the work of CCGs.

B. Ecosystem Restoration

New Zealand has many exceptional landscapes and endemic flora and fauna that give this country's biodiversity a distinct character not present anywhere else in the world. Native plants and animals, such as the kiwi and the silver fern, have been embraced as New Zealand icons and represent our identities as New Zealanders both locally and internationally. However many of New Zealand's native ecosystems have been significantly affected by development in both rural and urban environments. Much land has been cleared for agricultural purposes, particularly areas of low lying plains, such as those that make up large tracts of land in the Waikato.³ Many of New Zealand's indigenous ecosystems have either disappeared or are extremely vulnerable.⁴ For some badly damaged or incomplete ecosystems, restoration is their only chance at long term survival and ongoing management of conservation areas in New Zealand is vital to ensuring our unique biodiversity is maintained for future generations to enjoy.⁵

The Society of Ecosystem Restoration (SER) defines restoration as being "the process of assisting the recovery of an ecosystem that has been degraded, damaged, or destroyed".⁶ Geoff Park further defines ecosystem restoration as:⁷

[T]he process of repairing damage caused by humans to the diversity and dynamics of indigenous ecosystems. It begins with a judgment that an ecosystem is damaged to the point that it will not regain its former characteristic properties in the near future (say, two generations or about 50 years), and that continued degradation may occur.

The aim of ecosystem restoration is to return ecosystems to a state which is as close as possible to their form prior to human interference with the ultimate goal as

³ A. Saunders, *A Review of Department of Conservation Mainland Restoration Projects and Recommendations for Further Action* (2000) 17.

⁴ G. Park, *Nga Uruora: The Groves of Life: Ecology and History in a New Zealand Landscape* (1999) 15.

⁵ G. N. Park, *New Zealand as Ecosystems: The Ecosystem Concept as a Tool for Environmental Management* (2000) 7.

⁶ Society for Ecological Restoration International Science & Policy Working Group, *The SER International Primer on Ecological Restoration* (2004) 3.

⁷ Park, *supra* n 4 at 95.

restoring ecosystems to a level where they are able to function on their own without the need for additional inputs by people.⁸ This process involves a number of different steps including weed and pest removal, replanting of eco-sourced native plant species, and reintroduction of native animal species, many of which have legal implications.⁹

In the past in New Zealand restoration and conservation activities have largely focussed on maintaining keystone species and scenic landscapes. More recently the focus has shifted to considering ecosystems as a whole and how they are linked within landscapes.¹⁰ This is significant as protecting ecosystems as a whole, as opposed to protecting a few isolated species, is more “biologically sound” and means that any species that are yet unknown will also be protected.¹¹ The Resource Management Act 1991 (RMA) has assisted communities and local authorities alike to begin to understand the importance of land management in ecosystem terms by recognising the intrinsic value of ecosystems in section 7. Similarly the Reserves Act considers the environment in ecosystem terms.¹² The Environment Act defines ecosystem in s 2 as meaning “any system of interacting terrestrial or aquatic organisms within their natural and physical environment”. However the term “ecosystem” is not defined in the RMA, the Conservation Act, or the Reserves Act. In my opinion this is concerning as it leaves uncertainty as to how the term ecosystem will be construed when these statutes are interpreted in respect to ecosystem restoration activities. This is an issue from the point of view of groups whose focus is ecosystem restoration as it means that the legal status of their work is not clearly defined. As will be discussed issues like these warrant the amendment of New Zealand’s key environmental legislation so that it provides for CCGs.

⁸ Waikato Biodiversity Forum, *Restoring Waikato’s Indigenous Biodiversity: Ecological Priorities and Opportunities* (2006) 34; J. Ehrenfeld, and L. Toth, “Restoration Ecology and the Ecosystem Perspective” (1997) 5 *Restoration Ecology* 307, 307.

⁹ Department of Conservation, *Protecting and Restoring our Natural Heritage – A Practical Guide* (2000) 33.

¹⁰ Park, *supra* n 5 at 14.

¹¹ J. L. Brown, “Preserving Species: The Endangered Species Act Versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform” (1997) 12 *J. Env’tl. Law and Litigation* 151, 221-222.

¹² Reserves Act 1977, s 3(1)(b).

C. Community Conservation Groups and Participatory Ecosystem Management

“Biodiversity is ultimately lost or conserved at the local level so government policies to promote conservation gains must be supported by local action and effective partnerships involving local government, business and community groups”

V. Forgie, P. Horsley, and J. Johnston, *Facilitating Community-based Conservation Initiatives* (2001) 18.

As highlighted by the above quote the management of ecosystems at the community level is an important aspect of ensuring successful conservation outcomes in New Zealand. Ecosystem restoration is an activity which is often initiated by members of local communities who have identified a need for a restoration project in their locality.¹³ It involves communities taking action, in close co-operation with local councils and government departments, to protect those species and ecosystems that help to make New Zealand special and that are treasured by New Zealanders. As stated in one DoC publication:¹⁴

Ultimately, the act of conservation is a proclamation of how highly we as New Zealanders value the outstanding diversity of treasures that still exist here.

“Community” for the purposes of conservation work, can be defined as meaning “a number of people who have a goal and decide to work together to do something about it”.¹⁵ Community is an important concept for ecosystem restoration as successful restoration projects often require that there is co-operation between different groups within the community including landowners, businesses, regional and district councils, and CCGs.¹⁶

Community-based conservation reverses top down, centre-driven conservation by focusing on the people who bear the costs of conservation. In the broadest sense, then, community-based conservation includes natural resource or biodiversity protection by, for, and with local communities.

¹³ T. Young, “Restoration Ecology and Conservation Biology” (2000) 92 *Biological Conservation* 73, 77.

¹⁴ Department of Conservation, *Conservation General Policy* (2005) 7.

¹⁵ V. Forgie, P. Horsley, and J. Johnston, *Facilitating Community-based Conservation Initiatives* (2001) 6.

¹⁶ *Ibid*, 7.

Not-for-profit community environmental groups which, for the purposes of this research, I have termed community conservation groups (CCGs)¹⁷ are key players in the conservation and restoration of ecosystems. The efforts of CCGs in addition to public conservation activities significantly benefit conservation by providing a range of services that help to fill in the gaps where state services are lacking.¹⁸ These organisations often take innovative approaches to conservation work using community knowledge and experience to overcome environmental problems where perhaps more government-led approaches may not be as successful.¹⁹

The people who make up these groups are enthusiastic and dedicated people who are devoted to the work that they do. Volunteers participating in ecosystem restoration activities usually become the “backbone” of a project.²⁰ They assist with everything from pest management and tree planting to administrative work. They contribute hundreds of hours of voluntary labour to restoration projects many of which, without volunteers, would not be possible.²¹ Finally, the restoration projects they initiate help to ensure that important New Zealand ecosystems are enhanced and maintained which in turn helps to protect New Zealand’s biodiversity.²² In the Waikato region alone there are over 120 different CCGs undertaking work on both public and private lands and ranging in size from smaller informal groups made up of only a small number of individuals to large organisations such as Moehau Environment Group or Maungatautari Ecological Island Trust.²³

Lobbying by CCGs and other environmental non-government organisations, such as the Royal Forest and Bird Protection Society, has helped to shape New Zealand’s

¹⁷ The term ‘community conservation group’ was chosen as opposed to term such as ‘landcare group’ in an attempt to encompass as many community groups as possible. It was thought that referring to groups as landcare may fail to encompass restoration groups undertaking other forms of activities such as streamcare and lake care.

¹⁸ G. Stoneham, M. Crowe, S. Platt, V. Chaudhri, J. Soligo, and L. Strappazon, *Mechanisms for Biodiversity Conservation on Private Land* (2000) 32.

¹⁹ C. Binning and P. Feilman, *Landscape Conservation and the Non-Government Sector* (2000) 2.

²⁰ M. Akuhata-Brown et al, *Civil Society at the Millennium* (1999) 29.

²¹ Waikato Biodiversity Forum, *supra* n 8 at 13.

²² Department of Conservation, *supra* n 9 at 8.

²³ Environment Waikato, “Threats to Native Plants and Animals” available at <www.ew.govt.nz> (last accessed 16/05/07).

environmental laws and ensures community input into the laws that affect them. This shows the impact that CCGs can have on policy.²⁴ CCG participation in the development of laws pertaining to the management of ecosystems is therefore an important aspect of ensuring the maintenance of an active civil society, a point that I will cover in more detail shortly, and may help to ensure the long term effectiveness of environmental policies by ensuring community values are incorporated into management regimes.²⁵

Research commissioned by DoC into the relationship between the Department and CCGs identified ten key aspects which are important to CCG success:²⁶

... strong leadership, commitment, stability, specialist skills and knowledge, a vision and project plan, recognition of achievements, secure funding, an appropriate legal structure, a business approach, and good internal communication.

Many of these ideas also recurred throughout the comments made by members of CCGs during the interviews I conducted. There are further legal considerations, which will be discussed throughout the course of this paper, that are also important to a group's success. As CCGs are mostly made up of volunteers who undertake restoration work on a part time and unpaid basis, and with limited financial resources, dealing with the legal requirements can be a hefty burden.

D. Research Methodology

There were two main elements to the research methodology I used for this project. First, much of the research for this paper involved primary library and online research, followed by literature analysis and review. The second element was qualitative research. This part of the research was conducted in the form of semi-structured interviews with a range of different people involved in community restoration projects, from group co-ordinators from a number of different CCGs, to individuals working in a range of different government agencies who work with CCGs. The reason that I chose to conduct semi-structured interviews as opposed to

²⁴ Ministry for the Environment, *The State of New Zealand's Environment* (1997) 140.

²⁵ T. P. Duane, "Community Participation in Ecosystem Management" (2007) 24 Ecology Law Quarterly 771, 779.

²⁶ C. Wilson, *Developing Effective Partnerships Between the Department of Conservation and Community Groups* (2005) 20.

questionnaires or structured interviews was that by being loosely structured I was able to allow the interviewees freedom to speak openly about their experiences. I think that the semi-structured format was useful from this perspective as it allowed me to elicit information that I would not have been able to get had I followed a more structured interview or questionnaire. I also found that this was helpful as some interviewees raised ideas that I had not previously thought of and having a semi-structured interview structure meant that discussion of these ideas was possible.

In my initial discussions with Professor Barton we identified a number of key contacts who would be important to meet with for this research. To identify further people who would be useful to contact I conducted a number of online searches for CCGs in the Waikato Region. I also found a list of organisations in the Waikato Biodiversity Forum's publication "Restoring Waikato's Indigenous Biodiversity: Ecological Priorities and Opportunities"²⁷ and another in Hamilton City Council's "Who's Who" guide²⁸ which helped me to identify further useful contacts. Throughout the interview process interviewees often made suggestions of other people to contact and this also assisted me with identifying key contacts. Once I had established a list of key contacts and their details I proceeded to phone or email representatives of the groups to ask whether someone from the group would be willing to participate in an interview. Most interviews were conducted on a face to face basis and ranged from about 30 minutes to two hours.

Representatives from approximately 30 groups were interviewed as well as people from a number of government departments, councils, and other agencies involved with CCGs, such as the Waikato Biodiversity Forum. While I acknowledge that the small number of groups interviewed means that my sample is not representative of all restoration groups in New Zealand, or in the Waikato region, I interviewed a range of groups with different sizes and structures in an attempt to cover as broader range of scenarios as possible within the scope of this project. The interviews that I conducted

²⁷ Waikato Biodiversity Forum, *supra* n 8.

²⁸ Hamilton City Council, *Who's Who: The Green Guide to Organisations Working to Protect the Environment* (2003).

assisted me greatly in identifying legal barriers that affect the ability of CCGs to undertake restoration projects effectively in a way that would not have been possible through literature analysis alone. I am sincerely grateful to all those who gave up their time to participate in this research project. Their feedback has been invaluable.

E. Theoretical Context: Community Conservation Groups as part of Civil Society

“A strong civil society makes good resource management possible, while the landscape and its needs provide an attractive context for social interaction, thus strengthening civil society.”

J. Newton and W. Sullivan, “Nature, Culture, and Civil Society” (2005) 1 *Journal of Civil Society* 195, 203-204

1. Introduction

As may be observed in the above quotation from Newton and Sullivan successful management of environmental resources requires the existence of a strong civil society. Civil society is a sector of society which does not fit within the boundaries of the state, the family, or the market.²⁹ It can include such “non-state institutions” as the media, educational institutions, interest groups, churches and leisure groups.³⁰ It is largely made up of associations of individuals who have actively responded to the needs and interests of the public, or a particular sector of the community, by creating organisations which fill the gaps of the modern state and provide services that are generally for the benefit of the public.³¹ This sector may more commonly be referred to using such terms as voluntary sector, community sector, third sector, not-for-profit sector, or charitable sector.³² It includes such organisations as social clubs, sporting organisations, social welfare groups, and public lobbying groups.³³ ‘Civil Society’ has been defined as being:³⁴

²⁹ N. Deakin, *In Search of Civil Society* (2001) 1.

³⁰ D. Schechter, *Sovereign States or Political Communities? Civil Society and Contemporary Politics* (2000) 3.

³¹ Akuhata-Brown et al, *supra* n 20 at 7.

³² C. Wilson, *The Changing Face of Social Service Volunteering: A Literature Review* (2001) 15.

³³ Y. Hasenfeld and B. Gidron, “Understanding Multi-purpose Hybrid Voluntary Organizations: The Contributions of Theories on Civil Society, Social Movements and Non-profit Organisations” (2005) 1 *Journal of Civil Society* 97, 101.

[T]he network of autonomous associations that rights-bearing and responsibility-laden citizens voluntarily create to address common problems, advance shared interests, and promote collective aspirations. As a legitimate public actor, civil society participates alongside – not replaces – state and market institutions in the making and implementing of public policies designed to resolve collective problems and advance the public good.

It is a largely autonomous and independent sector which expands and contracts over time in response to community needs to fill the gaps where public services are lacking.³⁵ CCGs are one of a multiplicity of organisations that operate within the civil society sector. Therefore theories of civil society form a conceptual framework within which this research can be grounded.

While civil society is not part of the state sector, as a result of the restructuring of the state in the 1980s and 1990s and the “retreat” of the state from the provision of public services, the civil society sector has significantly expanded and civil society organisations (CSOs) have increasingly been undertaking services that would be traditionally considered within the domain of the state.³⁶ The traditional roles played by local councils have also changed with many of the services once provided by councils now being supplied by volunteer groups. A council is often now seen as the “community leader” whose role it is to help with the coordination of voluntary groups.³⁷ New Zealand has been no exception to this trend with the number of CSOs increasing significantly since the 1980s and taking over some of the roles traditionally performed by the state.³⁸ One sector of civil society which is having an increasing role in the provision of services for the public good is environment and conservation groups, with partnerships between government departments and CCGs being increasingly common in community conservation projects.³⁹

³⁴ Akuhata-Brown et al, *supra* n 20 at 6-7.

³⁵ J. A. Hall and F Trentmann, (eds.) *Civil Society: A Reader in History, Theory and Global Politics* (2005) 2-3; Deakin, *supra* n 29 at 16.

³⁶ J. Morison, “The Government-Voluntary Sector Compacts: Governance, Governmentality, and Civil Society.” (2000) 27 *Journal of Law and Society* 98, 100; A. Kidd, “Civil Society or the State?: Recent Approaches to the History of Voluntary Welfare.” (2002) 15 *Journal of Historical Sociology* 328, 329.

³⁷ I. Leigh, “The Legal Framework for Community Involvement” in A. Dunn (ed.), *The Voluntary Sector, the State and the Law* (2000) 9-10.

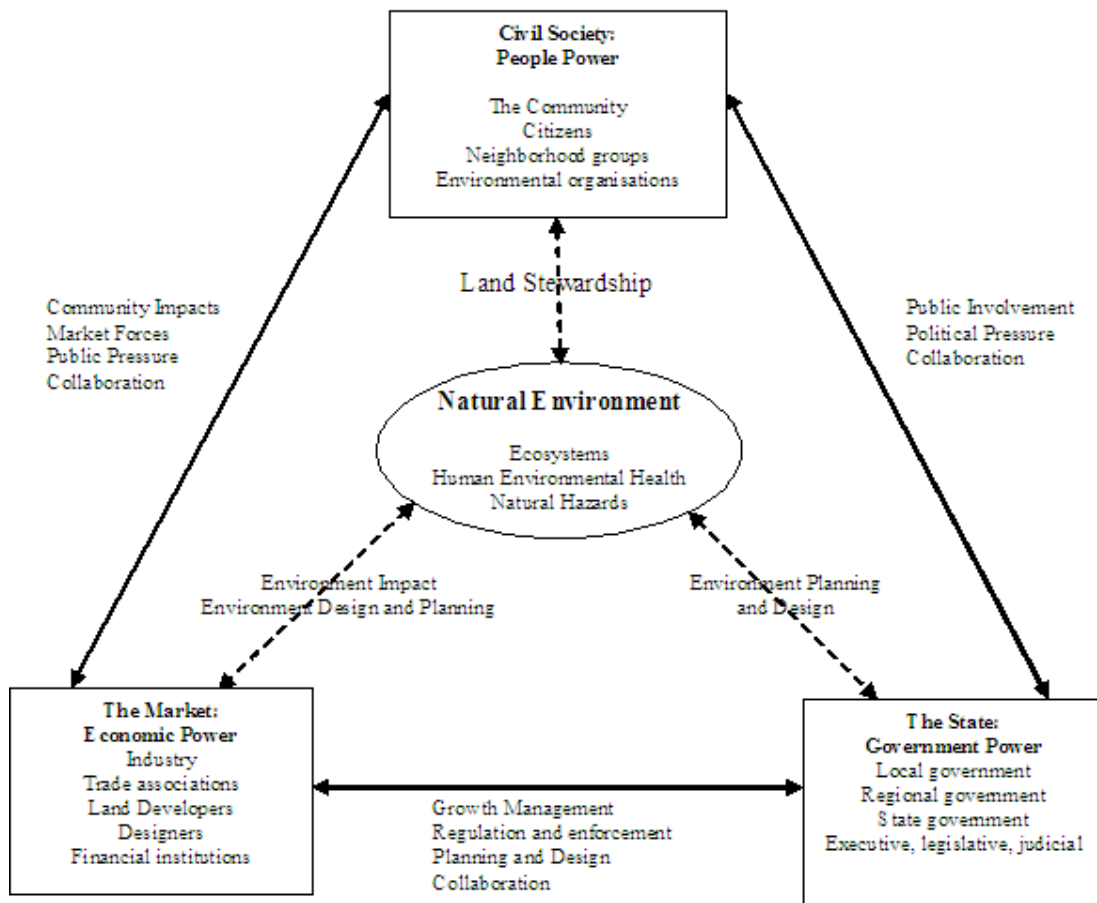
³⁸ L. P. Breckenridge, “Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management” (1999) 25 *Ecology Law Quarterly* 692, 693.

³⁹ Forgie, Horsley, and Johnston, *supra* n 15 at 7.

The following diagram, adapted from a text on environmental land use planning by John Randolph, helps to explain the relationship between civil society and other actors involved in environmental management. In the centre is the natural environment. All of the other actors interact with the natural environment and in varying ways with each other. The diagram clearly shows how civil society can place pressure on government and market sectors as well as the opportunities available between the sectors for collaboration on environmental matters.⁴⁰

Participants and Relationships in Environmental Planning and Management

(Adapted from J. Randolph, *Environmental Land Use Planning and Management* (2004) 6).



⁴⁰ J. Randolph, *Environmental Land Use Planning and Management* (2004) 6.

2. Legal Environment

Despite the fact that civil society can, in many instances, be seen as assisting the state in the provision of public services, the sector can either be restrained or enabled depending on whether or not a legal system is supportive of civil society. The state can either have a direct influence on the work of CSOs, through the provision of funding directly to these groups, or indirectly through aspects of the legislative and regulatory environment which impact affect CSOs.⁴¹ It can restrain the involvement of the community in resource management by preventing full public participation in decision making or can facilitate restoration by providing “institutional incentives”.⁴² For example, one of the important considerations that the state must allow for in order to facilitate development of a successful voluntary sector is to create methods for community groups to become incorporated, so that those who form groups are not burdened with the possibility that they may have to accept full responsibility for the liabilities of the group.⁴³

The benefits conferred by the state, and the public funding of CSOs, mean that the tax (and rate) paying public expect these organisations to meet minimum standards of accountability and to achieve the goals that justify the benefits.⁴⁴ Governments must learn to strike a balance between providing an enabling environment for CSOs and ensuring that there are adequate restrictions in place to make sure that they can be held publicly accountable.⁴⁵ However, it is important that the sector is not over-regulated otherwise the development and efficiency of CSOs may be restrained.⁴⁶ For example, Michael Edwards argues that the relationship between civil society and

⁴¹ D. Billis and M. Harris, *Voluntary agencies: Challenges of Organisation and Management* (1996) 14-15.

⁴² T. M. Koontz et al, *Collaborative Environmental Management: What Roles for Government?* (2004) 127.

⁴³ Statement of the Sixteenth Annual John Hopkins International Fellows in Philanthropy Conference Nairobi, Kenya. “Towards and Enabling Legal Environment for Civil Society” (2005) 8 *International Journal of Not-for-profit law* 3, 4-5.

⁴⁴ S. E. Klingelhofer and D. Robinson, *Law and Civil Society in the South Pacific: Challenges and Opportunities; International Best Practices; and Global Developments* (2004) 4.

⁴⁵ Akuhata-Brown et al, *supra* n 20 at 114.

⁴⁶ Klingelhofer and Robinson, *supra* n 44 at 9.

the state is mutually constituted and that if the relationship between the two is severed “then the positive effects of one on the other can be negated”.⁴⁷

In general states have been accepting of CSOs and have allowed a legal environment to form which is favourable to civil society. This has allowed these organisations to flourish.⁴⁸ New Zealand has been no exception, and with a legal environment particularly well suited to civil society organisations the voluntary sector in New Zealand has become exceptionally large.⁴⁹ While there is no formal register which records precisely how many voluntary organisations exist in New Zealand, in April 2007 there were approximately 23,000 incorporated societies registered and 16,000 charitable trusts.⁵⁰ The total number of voluntary organisations is probably well in excess of this number as there are many civil society groups carrying out community work that are not incorporated.

Two of the main statutes that my research identified as important to the effective functioning of the voluntary sector in New Zealand are the Incorporated Societies Act 1908 and the Charitable Trusts Act 1957. The recently enacted Charities Act 2005 is also important and allows an organisation to register as a charitable entity in order to receive tax relief. A diverse array of other legal and regulatory requirements, ranging from health and safety regulations to tax obligations, also impinge upon civil society and restrict the ability of groups to be successful. The advantages and disadvantages of these legal requirements for CCGs will be discussed in detail in later chapters.

3. Public Participation and Democratic Theory

As alluded to earlier another important element of facilitating a successful civil society is that there are avenues available for active participation of citizens in the

⁴⁷ M. Edwards, *Civil Society* (2004) 24.

⁴⁸ Kidd, *supra* n 36 at 329-332.

⁴⁹ M. James (ed.), *Exploring Civil Society: Essays on David Green's from Welfare State to Civil Society* (1998) 86.

⁵⁰ Ministry of Economic Development, Personal Communication, 27/04/07.

management of natural resources.⁵¹ Participation in such matters is considered to be a cornerstone of democratic society.⁵² For CCGs their role is not solely in relation to activities directly related to restoration work, such as weed removal and tree planting, but CCGs also have an important role to play in challenging policies or activities which may counteract the work that they are doing. Therefore it is important that they are given ample opportunity to participate in the management of local ecosystems and in the development of local and government policies that may impede their management.⁵³

An important theory to take into account when considering public participation is that of “civic republicanism”. Civic republicanism advocates the political theory of deliberative democracy⁵⁴ which can be defined as:⁵⁵

[A] school of political theory that assumes that genuinely thoughtful and discursive public participation in decision making has the potential to produce policy decisions that are more just and more rational than existing representative mechanisms.

Civic republicanism is relevant for CCGs as it argues the importance of “citizen deliberation”, that is deliberation by members of the community and government bodies in a setting where each participant is able to voice their opinions and have them considered by others. An important part of this process is for participants to listen to what others have to say and to talk through the issues while learning about the needs of other community interest groups and trying to understand their points of view.⁵⁶

⁵¹ B. Barton, “Underlying Concepts and Theoretical Issues in Public Participation in Resources Development” in D. N. Zillman, A. R. Lucas and G. Pring (eds.) *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (2002) 100.

⁵² W. A. Shutkin, *The Land That Could Be: Environmentalism and Democracy in the Twenty-First Century* (2001) 6; H. J. Cortner and M. A. Moote, *The Politics of Ecosystem Management* (1999) 92.

⁵³ Duane, *supra* n 25 at 772.

⁵⁴ Barton, *supra* n 51 at 97.

⁵⁵ W. F. Baber and R. V. Bartlett, *Deliberative Environmental Politics: Democracy and Ecological Rationality* (2005) 3.

⁵⁶ For a more in depth consideration of this point see: W. F. Baber and R. V. Bartlett, *Deliberative Environmental Politics: Democracy and Ecological Rationality* (2005); D. Held, *Models of Democracy* (2006).

While the major part of CCG work is delivering ecosystem services, participation in public decision making is also important. Through deliberative decision making made in collaboration with all relevant sectors of the community the needs of the community as a whole can be considered. The deliberative aspect means that members of the community are more likely to accept the policies as they have been able to consider the needs of other interest groups therefore should have a better understanding of the need for implementation of the law.⁵⁷ Adopting such an approach to the development of law relating to the management of natural resources would be significant as it may reduce the conflicts between different factions within the community and result in better environmental management.⁵⁸ For example policies made where farmers and conservationists have been able to discuss and understand each other's needs are likely to be more effective than policies developed in a top down fashion with little interaction between interested parties.

For participation to be truly democratic citizens must be able to take part in decision making not just comment on policies that are already made. Citizens must be given the opportunity to effectively participate in local decision making if they are to believe that their input is worthwhile.⁵⁹ Part of this is ensuring that members of civil society are provided with all the information that they need to make informed decisions.⁶⁰ Participation by civil society groups in the development of laws relating to environmental management can lead to the formation of more efficient and effective laws than if legislation is developed without public participation.⁶¹ Barton argues that the experience of NGOs in environmental matters can assist the state in identifying issues that may otherwise be overlooked. Similarly Duane points out that participation must extend beyond 'token' participation as development of policies

⁵⁷ Baber and Bartlett, *supra* n 55 at 12.

⁵⁸ D. Held, *Models of Democracy* (2006) 38 and 237-238.

⁵⁹ *Ibid*, 212-213.

⁶⁰ W. M. Simmons, *Participation and Power: Civic Discourse in Environmental Policy Decisions* (2007) 6, 130.

⁶¹ Barton, *supra* n 51 at 100.

which do not take serious consideration of community input are unlikely to be successfully implemented in the long term.⁶²

The civic health of communities is also an important element of ensuring successful conservation.⁶³ Without a healthy civic community, Shutkin argues, it will not be possible to achieve long term environmental results. As part of civil society CCGs can represent the viewpoints of citizens in public forums and when a number of different civil society groups work together on an issue to pursue joint goals then they can have the strength to have a powerful influence on the state.⁶⁴ To facilitate increased participation of CSOs in resource management decisions governments must acknowledge the need for flexibility for CCGs and adapt their procedures accordingly.⁶⁵ For example, Dr Michael Becker of Waitetuna Streamcare Group said that the fact that most council meetings are held during business hours can mean that members of CCGs are not able to voice their concerns at public hearings due to work commitments.⁶⁶ To help facilitate participatory democracy councils should endeavour to hold public meetings at a time of day when members of the public are more likely to be able to attend.

4. State/Civil Society Partnerships

The success of some CSOs has led to governments in many countries choosing to contract with these groups for the provision of services.⁶⁷ In the United Kingdom many voluntary groups that had previously received government funding through grants, are now choosing to enter into contracts with government agencies to provide public services in return for funding.⁶⁸ This ‘contract culture’ raises concerns about ensuring services are provided to the public in an efficient and effective manner and raises the bar of accountability for the voluntary group that agrees to provide the

⁶² Duane, *supra* n 25 at 780.

⁶³ Shutkin, *supra* n 52 at 27 and 131.

⁶⁴ Edwards, *supra* n 47 at 15 and 32.

⁶⁵ Koontz et al, *supra* n 42 at 127-128.

⁶⁶ Meeting with Dr Michael Becker, Waitetuna Streamcare Group, 02/08/07.

⁶⁷ Billis and Harris, *supra* n 41 at 14-15.

⁶⁸ D. Morris, “Paying the Piper: The “Contract Culture” as Dependency for Charities” in A. Dunn (ed.), *The Voluntary Sector, the State and the Law* (2000) 123.

services that would traditionally have been the role of the state or local authority. This means that voluntary groups are often now required to meet “performance indicators” in a similar fashion to standards that may be expected between contract partners in the corporate sector.⁶⁹ In other situations governments have formed successful partnerships with CSOs in order to tackle important public issues.⁷⁰

While there are requirements which must be fulfilled in order to receive funding in New Zealand, at present there has not tended to be the same type of contract culture that has emerged in the United Kingdom where the government has sought to create formal agreements, called “compacts”, with CSOs.⁷¹ The compacts are a form of agreement entered into between government agencies and CSOs that define how the relationship between the parties will work.⁷² These agreements are not contracts as such but provide the basis for a more formal arrangement in the future.⁷³ While New Zealand has not yet created formal arrangements to facilitate contracts between the government and CSOs for the provision of conservation services this does not mean that there are not active and successful relationships occurring between the community and government sectors. In many areas successful partnerships have formed between government departments and CCGs as in some instances it appears these specialised groups have been better suited to identifying the needs in their areas, and are able to undertake provide services in a manner which is more effective and efficient than those provided by the state.⁷⁴

Partnership between local or central government and CCGs has the opportunity to significantly increase the success of a restoration project. The resources and labour provided by CCGs help to fill in gaps where government funding is lacking. The close relationship between CCGs and the local community can mean that CCGs hold

⁶⁹ Ibid, 125.

⁷⁰ F. Fries, *Charity, Charity Law, and Civil Society: IPS Policy Paper Number 10* (2001), 13.

⁷¹ M. Lyons and L. Passey, “Need Public Policy Ignore the Third Sector? Government Policy in Australia and the United Kingdom” (2006) 65 *Australian Journal of Public Administration* 90, 95.

⁷² Morison, *supra* n 36 at 113.

⁷³ Ibid, 118-119.

⁷⁴ Reference has been made to this occurring in relation to other types of community groups in New Zealand, See for example; J. Cribb, *Being Accountable: Voluntary Organisations, Government Agencies and Contracted Social Services in New Zealand* (2006) 10.

valuable information about sites which can be of assistance to government authorities.⁷⁵ Being heavily involved in the community and independent from government also often means that CCGs can have better relationships with local landowners, and may be able to provoke wider community participation than a government-led scheme.⁷⁶ In return government agencies supply CCGs with information, research, and resources which are often vital to a group successfully achieving its outcomes.⁷⁷ In the context of community restoration projects in the Waikato, the relationship between CCGs and government agencies has largely been in the form of partnerships whereby groups work with DoC or Environment Waikato in order to get work done in the most effective means. The Department of Conservation's role in community-based projects varies depending on the individual project, ranging from a high level of involvement to more of an advisory role, with partnerships between CCGs and the Department being of particular importance where CCGs are carrying out work on DoC administered land.⁷⁸

However the emerging partnership between civil society and the state has led to controversy as there are doubts as to whether voluntary organisations are able to maintain their independence and autonomy when providing services on behalf of, or in association with, government agencies.⁷⁹ There is concern that the pressure to fit within state requirements in order to secure funding is forcing voluntary organisations to conform to the norms imposed by the state rather than pursuing their own objectives.⁸⁰ To a certain degree CSOs contracting to the state can undermine their independence and may weaken the ideal of civil society as providing an alternative to the services offered by state and market.⁸¹ There is concern that the contract culture may cause a voluntary group to become dependent on the funding and resources of one particular public body which could make the group and its project vulnerable in

⁷⁵ Stoneham, Crowe, Platt, Chaudhri, Soligo, and Strappazon, *supra* n 18 at 33.

⁷⁶ Binning and Feilman, *supra* n 19 at 2.

⁷⁷ Wilson, *supra* n 26 at 31.

⁷⁸ *Ibid*, 10-11.

⁷⁹ Billis and Harris, *supra* n 41 at 14.

⁸⁰ Fries, *supra* n 70 at 13.

⁸¹ Morison, *supra* n 36 at 103.

the event that the contract is terminated.⁸² Contracting may also reduce the ability of voluntary organisations to use their own innovation in undertaking their work by requiring them to operate within certain restrictions imposed under the contract. This can restrict the groups “freedom to determine the direction of their work”.⁸³

In relation to charities and societies with charitable status, Debra Morris argues that contracting with government agencies may make it difficult for groups to meet the standards required to qualify for charitable status.⁸⁴ For example, she argues that in contracting to a local authority for example, a group must ensure that the contracts it agrees to do not exceed the group’s objects or the activities may be ultra vires. Secondly, she argues that in entering into a contract groups must be careful not to restrict themselves to providing services to a restricted class of individuals or they may end up failing the public benefit test of charity law (discussed in detail in Part Two) and therefore risk losing charitable status.

Ian Harden argues that contracts between public bodies and voluntary groups take the choice of selecting their favoured service provider away from the individual.⁸⁵ This, he argues, modifies the traditional model of the market and means that supply of services is not necessarily connected to the demands of the public thus limiting “consumer sovereignty”.⁸⁶ In my opinion this argument does not apply well to CCGs as, in the communities where the CCGs I spoke to are located, the groups are made up largely from members of the community and there appears to be significant public support from other members of the community who may not be directly involved in the project. It is usually the CCG, as a representative for the community, who approaches public bodies for funding, not an organisation that is divorced from the community and its needs. While I believe that there may be other issues for CCGs choosing to contract with public bodies, such as maintaining their independence, I do

⁸² Morris, *supra* n 68 at 126.

⁸³ Ibid, 128.

⁸⁴ Ibid, 129-130.

⁸⁵ I. Harden, *The Contracting State* (1992) 7.

⁸⁶ Ibid, 11-12.

not think that consumer sovereignty is an issue for them in the sense argued by Harden.

However it must be remembered that, without the partnerships between CCGs and government agencies, much of the work being undertaken by CCGs would not be possible because of the expertise and funding provided by the state.⁸⁷ The relationship between the state and civil society has also led to higher levels of “professionalism and accountability” being required of the sector. This can have a positive impact on CCGs as it means that funding agencies feel more secure about providing them with resources and as a result CCGs gain better access to money and services.⁸⁸

⁸⁷ Meeting with Alasdair Craig, Department of Conservation, 15/05/07.

⁸⁸ M. Tennant, J. Sanders, M. O’Brien, and C. Castle, *Defining the Nonprofit Sector: New Zealand* (2006) 14.

PART TWO: CORPORATE ISSUES FOR COMMUNITY CONSERVATION GROUPS

A. Introduction

The legal environment within which CCGs operate has become increasingly stringent in requiring bodies to be accountable to the communities that they serve and the government agencies that fund them. Community organisations have been expected to raise the bar in both a structural and managerial sense. Organisers and board members are often expected to meet similar standards to directors of companies even though, for many, their roles are undertaken on a voluntary basis. Issues such as director's liability and conflict of interest can create very real concerns for CCGs and their management committees and the high onus placed on people in these roles can discourage participation by some members of local communities who fear personal liability.

Other key issues revolve around the corporate structure that groups choose to use and whether the structures that are currently available adequately provide for modern civil society organisations. To help overcome some of the structural issues many CCGs have taken on the experiences of those in the business world and have come to emulate organisations from the corporate sector.⁸⁹ However the appropriateness of such models in the community setting is questionable and may not always meet the needs and expectations of local communities. This section of the paper will outline the corporate issues faced by CCGs and the impact of corporate law on these groups.

B. Corporate Structure

Choosing an appropriate corporate structure is an important element of ensuring the success of a CCG. The structure chosen by a group can affect its legal status, opportunities for funding and tax benefits, and the potential for personal liability of group members. Yet many groups fail to understand the importance of choosing the

⁸⁹ P. Booth, "Understanding Management Control and Accounting in Voluntary Organisations" (1996) 2 Third Sector Review 19, 24-25.

correct legal structure and how it can contribute to their success, particularly in respect to funding applications.⁹⁰ There are a variety of different organisational structures that CCGs could use, although the two most common structures I encountered during the interview process were incorporated societies registered under the Incorporated Societies Act 1908, and charitable trusts under the Charitable Trusts Act 1957.⁹¹ Some of the groups I spoke to found that their group operated effectively as an unincorporated society. Other groups found that becoming incorporated has been a significant advantage for them. However at some point in the group's development incorporation may become a necessity as funding agencies often expect a group to be either an incorporated society or charitable trust before they will even consider their application for funds.⁹² Rachael Goddard of Te Kauri-Waikuku Trust says that questions about the trusts corporate structure are usually the first thing that they are asked when making funding applications.⁹³

The choices that a group makes in its initial stages about the legal structure that it will use and the way that the group will be managed will have a significant impact on whether it can successfully achieve its objectives. Therefore making an informed decision about which structure to use is crucial as the suitability of the different structures will depend on the size of the group, its activities, and the way that the community wants the restoration project to be managed.⁹⁴ A formal legal structure can also help to ensure that a group is maintained in the longer term, whereas groups that have not used a formal structure may be less likely to maintain regular contact.⁹⁵ The structure chosen can affect the level of community ownership and involvement in a project. In particular, as noted by Carla Wilson, trust structures have the potential to be "quite exclusive" and may limit community involvement.⁹⁶ Therefore it is important that in becoming formally constituted groups do not become divorced from

⁹⁰ Meeting with Alasdair Craig, Department of Conservation, 15/05/07.

⁹¹ Charitable Trusts Act 1957, ss 7-8.

⁹² M. Agmen-Smith and M. von Dadelszen, *Advising Not-for-Profit Organisations* (2005) 3.

⁹³ Telephone conversation with Rachael Goddard, Te Kauri-Waikuku Trust, 27/07/07.

⁹⁴ Wilson, *supra* n 26 at 27-28.

⁹⁵ Forgie, Horsley, and Johnston, *supra* n 15 at 38; Meeting with Dr Michael Becker, Waitetuna Streamcare Group, 02/08/07.

⁹⁶ Wilson, *supra* n 26 at 27.

the communities that initially formed them or they risk losing community support.⁹⁷ Finally, choosing to incorporate also means that groups will have to comply with tax legislation,⁹⁸ reporting requirements under the Incorporated Societies Act and, for those who apply for charitable status, reporting requirements under the Charities Act 2005. These requirements can all be quite onerous for groups which are often largely operated by volunteers.

Some of the CCGs that I talked to during the course of interviewing spoke of the difficulties surrounding incorporation. Another issue was that the current structures tend to use a “one size fits all” approach which applies the same requirements to groups with only a few members to the larger groups with many members and much greater resources.⁹⁹ These issues suggest that the current legal structures do not adequately provide for civil society organisations such as CCGs. The Incorporated Societies Act 1908 is now almost 100 years old and the organisations that are now administered under the Act are often far different in form, and in size, than the clubs that existed 100 years ago. Aside from this point the Act is not a code as to what precisely becoming incorporated means or requires, and little guidance is provided as to how best to draft rules despite the importance placed on rules by the courts. The law surrounding charitable trusts is similarly vague and many of the principles now being applied to charitable trusts by the courts have arisen in contexts far removed from environmental activities of the 21st Century. This makes it difficult to ascertain the outcomes should litigation arise. What all of this points to is that it may now be time for New Zealand to consider adopting models more suitable for use by a modern civil society.

It is not possible to specify what structure will be best suited to all groups as the differing needs of groups will be determinative of what structure will meet the groups needs.¹⁰⁰ However throughout the following sections I have tried to show some of the

⁹⁷ Edwards, *supra* n 47 at 35.

⁹⁸ Forgie, Horsley, and Johnston, *supra* n 15 at 39.

⁹⁹ Meeting with Alasdair Craig, Department of Conservation, 15/05/07.

¹⁰⁰ Forgie, Horsley, and Johnston, *supra* n 15 at 37.

advantages and disadvantages of the two main structures and have suggested some measures group members can take to ensure that the structure they choose works well for them and so that their project can run as smoothly as possible. Throughout the remainder of this section of the paper I will introduce some of the most common corporate structures used by CCGs and weigh up the advantages and disadvantages of these structures. I then will go on to discuss the experiences of CCGs with using the current corporate structures in practice, and the issues that some groups have had with the process of formalising their group structure.

1. Unincorporated Society

An unincorporated society is a group of individual members who form an association for a purpose other than to make a pecuniary gain,¹⁰¹ and is usually managed by a committee who administer the affairs of the society.¹⁰² It is not uncommon for groups carrying out community conservation work to be unincorporated societies and in 2006 it was estimated that for every incorporated voluntary group there may be at least two groups that are unincorporated.¹⁰³ For many groups the unincorporated society structure functions well. However when something goes wrong there may be implications for the members of unincorporated societies, which are not always considered by activity organisers and group members undertaking community work.

One of the important things that members of unincorporated societies, particularly those managing activities, must be aware of is the potential for them to have personal liability for the obligations that the group has to third parties. In general, where debts are owing that the society is unable to pay, or legal action is taken against an unincorporated society, the members of the management committee may be held personally liable.¹⁰⁴ This may include liability for “debts, torts (negligence, nuisance,

¹⁰¹ *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, 20.

¹⁰² M. von Dadelszen, *Law of Societies in New Zealand: Unincorporated, Incorporated, and Charitable* (2000) 12.

¹⁰³ Tennant, Sanders, O’Brien, and Castle, *supra* n 88 at 17.

¹⁰⁴ See for example; *Bradley Egg Farm v Clifford* [1943] 2 All ER 378, 381; *Hostick v The New Zealand Railway and Locomotive Society Waikato Branch Inc* [2006] 3 NZLR 842, 847.

occupiers' liability etc), and statutory obligations and offences".¹⁰⁵ For example in *Bradley Egg Farm v Clifford* an action was taken against the executive committee of an unincorporated society when a servant of the society negligently carried out tests on chickens which resulted in the death of a large number of the birds. In that case the Court of Appeal found that the committee could be held liable because the servant was an agent of the committee.¹⁰⁶

It is the defendant committee who is liable as Gates' principals, and they are his principals, not because they are members of the society, but because they are the committee entrusted with the function of directing the activities of this unincorporated body and putting them into execution.

Members of an unincorporated society will usually not be liable to pay monies to an unincorporated society beyond what they have agreed to pay in membership fees.¹⁰⁷

Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member.

However in limited circumstances members who have voted in favour of certain expenditure, particularly the management committee, may be liable for a share of the debt in the event the society is unable to pay.¹⁰⁸ Alternatively if the society has rules and the rules provide that the members accept responsibility for its liabilities, or to indemnify the management committee, then the members can be liable for having accepted the society's rules.¹⁰⁹ This also applies to incorporated societies.

In the event that tortious liability arises for activities carried out by an unincorporated society, for example if a person is seriously injured as a result of negligent management of an activity, then the injured person may take an action in tort against the member of the society who was responsible for the tort occurring.¹¹⁰ Criminal liability may also arise for members of unincorporated societies organising events as

¹⁰⁵ von Dadelszen, *supra* n 102 at 14.

¹⁰⁶ *Bradley Egg Farm v Clifford* [1943] 2 All ER 378, 381.

¹⁰⁷ *Wise v Perpetual Trustee Company* [1903] AC 139, 149.

¹⁰⁸ *Carr v Shaw* [1913] NZLR 726, 727-728.

¹⁰⁹ *Hostick v The New Zealand Railway and Locomotive Society Waikato Branch Inc* [2006] 3 NZLR 842, 847.

¹¹⁰ Tennant, Sanders, O'Brien, and Castle, *supra* n 88 at 17.

was demonstrated in the case of *R v Andersen* where a cycle race organiser was charged under s 145 of the Crimes Act for failing to properly advise cyclists of the fact that the road they were racing on was not closed to traffic.¹¹¹ Although Ms Andersen was not convicted, as the Court of Appeal was not satisfied that her actions qualified as criminal nuisance, the case demonstrates the possible risks that activity organisers take if they do not take the necessary steps to protect themselves and in my opinion provides justification for groups to consider taking out insurance to indemnify group members in the event that a serious injury occurs. This is not to say that a victim of negligence may not still choose to take a personal action against the organiser of an incorporated society, possibly in conjunction with an action against the society. However the possibility is likely to be reduced as blame may also be apportioned to the society itself. This cannot occur in the case of an unincorporated society.

Another of the major issues regarding unincorporated societies is their lack of separate legal personality. This has several implications for society members. One of the reasons why this is an issue is that an unincorporated society is unable to own property or borrow money in its own name,¹¹² therefore any money must either be held by another organisation which is incorporated, or alternatively the property may be held on trust by members of the society.¹¹³ This concern was also raised in the interview process and was often one of the main motivations for a group to become incorporated. Secondly, lack of legal personality means that an unincorporated society is unable to take legal action or to be sued in its own name. This not only means that it is up to the members of the society to defend or pursue legal action of the society in their own names, but in the event of a judgment being awarded against them the committee members may be personally liable to pay any award made

¹¹¹ *R v Andersen* (2004) 20 CRNZ 1086, 1098-1099.

¹¹² *Hostick v The New Zealand Railway and Locomotive Society Waikato Branch Inc* [2006] 3 NZLR 842, 852.

¹¹³ Tennant, Sanders, O'Brien, and Castle, supra n 88 at 17; S. Watson (ed.), *The Law of Business Organisations* (4th ed.) (2003) 672.

against the group.¹¹⁴ Finally, lack of legal personality means an unincorporated society does not have perpetual existence beyond that of its members. This means that the life of the organisation may be limited to that of its members.¹¹⁵

A further problem with unincorporated societies is that there is no legal requirement for such groups to have any type of constitution or rules as is required for societies incorporated under the Incorporated Societies Act. This means that many unincorporated groups either have no formal rules to determine how important matters will be dealt with, or the rules that the group has are vague or incomplete.¹¹⁶ Therefore if a dispute arises between members of the society it is often not clear how the matter should be dealt with. For example, if there are no rules as to members rights and obligations it is difficult to determine what duties a member owes to the society. This may mean that the matter has to be referred to the courts for determination at considerable cost to all involved.¹¹⁷

Because of the issues discussed above many funding agencies are reluctant to provide any significant amounts of funding to unincorporated groups, preferring to provide funding to more organised groups with formal legal structures in place and higher levels of accountability.¹¹⁸ To overcome the issues associated with unincorporated structures groups should consider the options available for incorporating. Some of these options are discussed below.

C. Costs and Benefits of Incorporation

Given the difficulties that may be experienced under unincorporated structures many groups have chosen to become incorporated with the two most common formal structures used by CCGs being incorporated societies and charitable trusts.

¹¹⁴ See for example: *Millar v Smith* [1953] NZLR 1049, 1054 where North J, as he then was, held that the defendant officers of the club were liable to pay costs to the successful plaintiff. While North did not order damages in this case he made it clear that a damages award could arise in different circumstances.

¹¹⁵ von Dadelszen, supra n 102 at 12.

¹¹⁶ Agmen-Smith and von Dadelszen, supra n 92 at 16.

¹¹⁷ Ibid.

¹¹⁸ Meeting with Alasdair Craig, Department of Conservation, 15/05/07.

Incorporation not only limits the personal liability of group members but usually mean that the group's objectives and rules will be clearly defined. The process of incorporation requires a group to define its objectives, and shows that it is organised and serious about what it is doing¹¹⁹ which in turn makes the group more attractive to funding agencies.¹²⁰ Importantly for conservation activities incorporation may also increase the ability of groups to participate in RMA processes:¹²¹

[F]or example only a 'body corporate' (which includes incorporated societies) can apply under the RMA to be a heritage protection authority.

While there are significant advantages of incorporation there are, however, some general areas where groups can struggle to manage the obligations that formalisation requires. The financial requirements under the Incorporated Societies Act and the Charities Act can be quite onerous, particularly to the smaller groups run solely by volunteers,¹²² many groups struggle to successfully draft constitutions,¹²³ and others can battle to put in place the internal management structures required to be successful.¹²⁴ The next part of this chapter will discuss the advantages and disadvantages of the corporate structures available under the Incorporated Societies Act and Charitable Trusts Act, and suggest some possible improvements to these structures with reference to literature and experiences in overseas jurisdictions. I will also briefly evaluate one of the other structures available in New Zealand that could possibly be used more often, umbrella groups.

1. Incorporated Societies

Incorporated societies, registered under the Incorporated Societies Act 1908, are the most common type of legal structure used by non-profit groups in New Zealand.¹²⁵ One of the reasons why this form of legal structure has been so popular is because it

¹¹⁹ Meeting with Wendy Jon, Friends of Oakley Creek, 14/05/07.

¹²⁰ Tennant, Sanders, O'Brien, and Castle, *supra* n 88 at 15.

¹²¹ K. Chapple, "Achieving Good Environmental Results" in R. Harris (ed.) *Handbook of Environmental Law* (2004) 24.

¹²² Meeting with Alasdair Craig, Department of Conservation, 15/05/07.

¹²³ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

¹²⁴ Meeting with Alasdair Craig, Department of Conservation, 15/05/07.

¹²⁵ Tennant, Sanders, O'Brien, and Castle, *supra* n 88 at 18.

allows individual members to have direct input into the running of the group, for example, through the group's Annual General Meeting (AGM).¹²⁶

The first step to forming an incorporated society is for the majority of group members to agree to becoming incorporated.¹²⁷ It is then necessary to meet three minimum requirements. Firstly, in order to incorporate the group must have a minimum of 15 adult members.¹²⁸ Members may be either natural persons, or corporate bodies, however each corporate body will account for three natural persons;¹²⁹ Secondly, under s 4(1) of the Incorporated Societies Act the society must be formed for a lawful purpose; and thirdly, the society must not be operated for the purpose of making pecuniary gain.¹³⁰ This however does not prevent a society from making a profit provided the profit is used to further the group's objects and is not returned to the members of the society.¹³¹

One of the significant differences between incorporated and unincorporated societies is that incorporated societies are required, under s 6 of the Incorporated Societies Act, to have rules and objects to guide the operation of the society spelled out in a constitutional document. The constitution is the key "reference point" for those running an incorporated society and helps to determine how the society will be managed and decisions made.¹³² Section 6 of the Act sets out the minimum rules that an incorporated society must have, such as specific procedures on how people can become members of the society and how membership ceases. However, the rules are not limited to those specified in the Act and can include rules on other matters.¹³³

The rules of a society should be drafted in a manner which clearly sets out what is expected of the society and its members so to avoid difficulties of interpretation in the

¹²⁶ Ibid.

¹²⁷ Incorporated Societies Act 1908, s 4.

¹²⁸ Ibid, s 4(1).

¹²⁹ Ibid, s 31.

¹³⁰ Ibid, ss 4(1) and 20.

¹³¹ Ibid, s 5(a).

¹³² *Waitakere City Council v Waitemata Electricity Shareholders Inc* [1996] 2 NZLR 735, 743.

¹³³ Incorporated Societies Act 1908, s 6(2).

event of a dispute. This is important because the rules create contractual obligations between the society and its members and if either party breaches the rules then the other party may be entitled to take legal action to have the rules enforced.¹³⁴ The importance of drafting good rules and putting them into practice can be demonstrated by the case of *Hawkes Bay and East Coast Aero Club Incorporated v McLeod*.¹³⁵ McLeod, a member of the club, had been injured in a plane crash and sought reparation for his injuries. The Aero Club, incorporated under the Incorporated Societies Act, had included in its rules two clauses that aimed to exclude the club from liability in the event that any member was injured during the use of its aircraft. The first clause stated that the club would “not accept any liability for injury or damage” as a result of the use of the clubs facilities. However the second clause stated that the club would not be liable if the member had signed a disclaimer to exempt the club from liability. The court said that “to exempt a person from liability, clear words should be used”.¹³⁶ It was found that by reading the clauses together that the first rule became qualified by the second therefore because the club failed to get McLeod to sign an exemption it could be held liable for McLeod’s injuries.¹³⁷

One of the important requirements of s 6 is that a society must state its objects in its rules. The objects of a society are the purposes for which the society has been established.¹³⁸ Once the objects are registered it is expected that the society will follow them and a society that carries out activities which are beyond its objects can be found to have acted ultra vires.¹³⁹ While incorporated societies are able to undertake actions which are reasonably necessary to the achievement of their specified objects, a society which has taken actions or entered into contracts which are outside of its objects or actions which would be reasonable to take to achieve the objects, then the actions may be declared void.¹⁴⁰ In the event that a contract that the group has entered into is declared ultra vires then those committee members

¹³⁴ Laws of New Zealand, *Incorporated Societies and Other Associations* 33.

¹³⁵ [1972] NZLR 289.

¹³⁶ *Hawkes Bay and East Aero Club Incorporated v McLeod* [1972] NZLR 289, 296.

¹³⁷ *Ibid*, 297.

¹³⁸ *Waitakere City Council v Waitemata Electricity Shareholders Inc* [1996] 2 NZLR 735, 743.

¹³⁹ Watson, *supra* n 113 at 685.

¹⁴⁰ *AA (Wellington) v Daysh* [1955] NZLR 520, 532.

responsible for the decision may be personally liable to the other party to the contract.¹⁴¹ Alternatively if the group has entered into a contract which is ultra vires the rules then they will be unable to enforce the contract against a third party that defaults.¹⁴²

Where a society intends to undertake a broad range of activities it is helpful if it keeps its objects broad to allow it to carry out all activities associated with the society otherwise members of the society or the public may be able to protest to the Registrar of Incorporated Societies who may request that the society refrain from the ultra vires activity.¹⁴³ The Ministry of Economic Development suggests that it may be beneficial for incorporated societies to include in their objects a broad statement which specifies that the society may “do anything necessary” in order to meet its objectives to avoid being unduly restricted by the rules if the activities of the society change.¹⁴⁴ This is not to say that the rules of an incorporated society cannot be altered, s 21 of the Incorporated Societies Act specifically states that the rules may be altered in the manner provided by the rules and in accordance with the Act, however it is not uncommon for disputes to arise about whether or not the powers to alter the rules have been properly exercised.¹⁴⁵ As will be discussed further in relation to trust deeds, it would be wise for incorporated societies to make it clear in the rules what powers the management committee have to alter the rules to try and prevent disputes arising in the future.¹⁴⁶

As alluded to above becoming incorporated helps groups to overcome many of the issues that members of unincorporated societies face; Firstly, it means that members of an incorporated society are generally free from personal liability for any contracts,

¹⁴¹ See for example; *Collen v Wright* [1843-60] All ER Rep. 146, 149.

¹⁴² *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673, 674.

¹⁴³ Incorporated Societies Act 1908, s 19.

¹⁴⁴ Ministry of Economic Development, *How to Draft a set of Rules* available at <www.societies.govt.nz> (last accessed 4/05/07).

¹⁴⁵ See for example; *Waitakere City Council v Waitemata Electricity Shareholders Inc* [1996] 2 NZLR 735.

¹⁴⁶ The same is true for an unincorporated society that has formalised rules.

debts, or other obligations entered into by the society.¹⁴⁷ Although this does not mean that the committee members will be entirely free from the possibility of legal liability, for example, committee members may still be liable if they enter into obligations that are outside of the group's objects.¹⁴⁸ It is also likely that officers of an incorporated society will owe a duty of care to the society in a similar way to how directors of a company owe duties to the company.¹⁴⁹ They may also owe duties to creditors of the society in the event that it is not able to meet its financial obligations.¹⁵⁰ In this situation sections 297-301 and Part 17 of the Companies Act in relation to director's liability will apply irrespective of whether the committee members are paid for their efforts or not;¹⁵¹ Secondly, incorporated societies are entitled to enter into contracts, purchase and sell property, and take legal action in their own name;¹⁵² Thirdly, incorporated societies have perpetual existence which means that they will remain an incorporated society, beyond the involvement of particular members, provided that they are not removed from the register.¹⁵³ One person I spoke to who has been involved in both an incorporated and an unincorporated CCG found that the requirements of the Incorporated Societies Act for groups to have meetings means that it can force a group to get together and take action whereas with an unincorporated group meetings may not occur on a regular basis unless there is someone devoted to organising them.¹⁵⁴

The Environmental Defence Society (EDS) advises groups it is involved with that before they take legal action in the Environment Court they should become registered as an incorporated society. There are three main reasons for this; firstly, it increases the credibility of the group; secondly, it increases the opportunities for the group to gain funding; and thirdly, if the group lose their case in the Environment Court then the individual members of the group are not personally liable if costs are awarded

¹⁴⁷ Incorporated Societies Act 1908, s 13.

¹⁴⁸ See for example; *Collen v Wright* [1843-60] All ER Rep. 146, 149.

¹⁴⁹ *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163, 166.

¹⁵⁰ Incorporated Societies Act 1908, s 24(3) and 26(3).

¹⁵¹ *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163, 166.

¹⁵² Incorporated Societies Act 1908, s 10.

¹⁵³ *Ibid.*

¹⁵⁴ Meeting with Dr Michael Becker, Waitetuna Streamcare Group, 02/08/07.

against the group. Raewyn Peart of EDS said that they recommend groups become an incorporated society rather than a charitable trust because the incorporated society structure provides greater security for costs¹⁵⁵ – according to Raewyn trusts fall somewhere in between unincorporated groups and incorporated societies and therefore there is greater potential for personal liability of trustees.

While much of the literature I have cited, and the references I have made refer to the importance of incorporation, little has been said about the difficulties or challenges that may be encountered when a CCG moves from being unincorporated to becoming an incorporated society. The conversations that I had with members of some incorporated society groups suggested that the incorporation process itself is not at all plain sailing,¹⁵⁶ and that once incorporated there are also increased accounting and management requirements for CCGs which can be quite onerous.¹⁵⁷ This can be particularly difficult for small groups that are in the early stages of development.¹⁵⁸ Groups have to spend a significant amount of time, money, and resources to become incorporated due to the requirements to formulate rules, create a constitution, and organise a management structure. Several of the groups I talked to said that the time that it took for them to draft their rules and constitution was significant and slowed them in getting on with the restoration considerably, with one group taking approximately a year to debate the rules amongst the group and finalise them.¹⁵⁹ It can also be difficult for groups starting out to be able to find the money to be able to pay the \$100.00 fee for incorporation, and further funds to pay for a lawyer to check

¹⁵⁵ Under section 17 of the Incorporated Societies Act a court may make an order for security for costs against a plaintiff society. See for example; *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746. In that case at page 749 the court held that while security for costs awards must not be so great as to deny a smaller group to take an action against a larger body it can be ordered to prevent an impecunious plaintiff placing an undue burden on a defendant by its inability to pay costs. The public interest nature of the proceeding will be an important consideration in deciding whether or not an award of security for costs against a society is justified: See for example; *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [1997] NZRMA 132.

¹⁵⁶ Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

¹⁵⁷ Section 23 of the Incorporated Societies Act requires incorporated societies to submit an annual financial statement to the Registrar. This statement must include; (a) The income and expenditure of the society during the society's last financial year; (b) The assets and liabilities of the society at the close of the said year; (c) All mortgages, charges, and securities of any description affecting any of the property of the society at the close of the said year.

¹⁵⁸ Meeting with Alasdair Craig, Department of Conservation, 15/05/07.

¹⁵⁹ Meeting with Dr Michael Becker, Waitetuna Streamcare Group, 02/08/07.

over the documents.¹⁶⁰ One CCG that I spoke to, Tui 2000, found it difficult to find 15 members to be able to go ahead with incorporation as many of the volunteers that are involved in the group do not regularly participate in group activities.¹⁶¹ On the other hand, large groups can have difficulties with administration particularly if they have large management committees.¹⁶²

One of the other concerns that I had from the interview process was that there was a general misconception by groups incorporated under the Incorporated Societies Act that one of the major advantages of becoming incorporated as a society, as opposed to a charitable trust, was that incorporated societies were more democratic because members can have a direct input into the running of the group through meetings.¹⁶³ However it is debatable whether an incorporated society is truly “democratic” in the sense that it was used by interviewees as decisions of the group are ultimately made by the management committee on behalf of the group¹⁶⁴ and there is nothing in the Incorporated Societies Act that requires decisions to be made in a democratic way. In fact for some groups it is easier to manage the group without direct member input in decision making as this can be too time consuming. High levels of input by members in decision making has sometimes been found to hinder group progress because there can be “too many people with too many agendas”.¹⁶⁵ However, Dana Brakman Reiser argues that internally undemocratic non-profit organisations go against what civil society is all about. She argues that if civil society groups do become undemocratic the strength of civil society is weakened and may threaten public support as a result.¹⁶⁶ It seems that most societies are able to find a happy median between the two situations, however it is important to note that internal democracy is by no means guaranteed in an incorporated society unless it is provided for in the rules.

¹⁶⁰ Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

¹⁶¹ Ibid.

¹⁶² H. Stretton, *Meetings, Motions, Minutes and More: A Guide for Incorporated Societies and the Unpaid Heroes Who Manage Them* (2006) 49.

¹⁶³ Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

¹⁶⁴ Stretton, *supra* n 162 at 21.

¹⁶⁵ Wilson, *supra* n 26 at 27.

¹⁶⁶ D. Brakman Reiser, “The Social Cost of Internally Undemocratic Nonprofits” (2003) 82 Oregon Law Review 829, 831.

(a) Improvements

In a meeting I had with representatives from Waikato Biodiversity Forum, Environment Waikato, and Biodiversity Advice Waikato, organisations that all work in close contact with CCGs, we discussed some of the issues that smaller CCGs have had with becoming incorporated. One point that arose was the lack of use of umbrella groups by New Zealand CCGs.¹⁶⁷ An umbrella group is a group which is already incorporated that operates as a parent body and can receive property or funds on behalf of an unincorporated group. This arrangement provides some of the advantages of incorporation in that it may help an unincorporated group to secure funding and hold property without the cost of incorporation.¹⁶⁸ Jan Hoverd of Biodiversity Advice Waikato said that in her experience New Zealand CCGs use umbrella group structures infrequently and have little knowledge about this arrangement being available as an alternative to incorporation. She said that she thinks that it would be more appropriate for some of the smaller groups to use this type of structure, as an alternative to incorporation, as it would reduce costs and save the difficulties of having to find the 15 members required to incorporate.¹⁶⁹ One example of where an umbrella group structure is being used effectively is in relation to Tui 2000s management of the restoration at Waiwhakareke. Tui 2000 is currently being used as the parent body for the project and is responsible for administering the projects funds on behalf of the other organisations involved. This has saved the parties from having to go through the process of incorporating a separate body to manage the project. Tui 2000 works in close contact with all of the other parties to ensure that the funds are being managed appropriately.¹⁷⁰ Umbrella group structures have also been widely used in the United States by non profit groups with much

¹⁶⁷ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

¹⁶⁸ D. R. Young, *Organizational Identity and the Structure of Nonprofit Umbrella Associations* (2001) 11 Nonprofit Management and Leadership 289, 292-294.

¹⁶⁹ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

¹⁷⁰ Meeting with Dr Bruce Clarkson, University of Waikato, 03/09/07.

success.¹⁷¹ For example, the United States Land Trust Alliance (LTA) is an umbrella organisation of which many land American land trusts are part.¹⁷²

There are also examples from the Australian law on incorporated societies that may be useful to apply in New Zealand. For example, none of the Australian jurisdictions require that there be a minimum of 15 members for a group to become incorporated.¹⁷³ In New South Wales an incorporated society need only to have five members to become registered.¹⁷⁴ Similarly in Queensland only seven members are required.¹⁷⁵ If New Zealand were to follow this example this would reduce the issues that some of the smaller groups, like Tui 2000, experience when trying to find 15 members. It may also be helpful for there to be a set of model rules annexed to the Incorporated Societies Act which groups could adopt or modify for their purposes.¹⁷⁶ This would prevent every group from having to draft their rules from scratch therefore saving time and money and helping prevent groups from using poorly drafted rules.¹⁷⁷ Some of the groups that I spoke with suggested that it would be helpful if there were a set of rules drafted specifically with CCGs in mind as general rules which may be appropriate for other societies often are not appropriate for environmental purposes.¹⁷⁸ In some of the Australian states model rules are annexed to the statutes and groups can choose to adopt these rules in their standard form or to modify them to meet their needs. For example, the Queensland Associations Incorporation Act 1981 provides a set of model rules that can be used if the society does not chose to create its own rules.¹⁷⁹ If New Zealand were to adopt such a model New Zealand CCGs would be greatly assisted through their early developmental stages.

¹⁷¹ Young, *supra* n 168 at 290.

¹⁷² R. Brewer, *Conservancy: The Land Trust Movement in America* (2003) 11.

¹⁷³ K. L. Fletcher, *The Potential Australian Contribution to the Development of (N.Z) Incorporated Societies Act* (1989) 8.

¹⁷⁴ Associations Incorporation Act 1984 (NSW), s 7(1).

¹⁷⁵ Associations Incorporation Act 1981 (Qld), s 5(1)(a).

¹⁷⁶ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

¹⁷⁷ Fletcher, *supra* n 173 at 10-11.

¹⁷⁸ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

¹⁷⁹ Associations Incorporation Act 1981 (Qld), s 6.

2. Charitable Societies and Trusts

The other main forms of corporate structure which can be used by CCGs are charitable trusts which can incorporate either in a trust or society form.¹⁸⁰ Charitable trusts are formed for the purposes of providing a benefit to the public and in order to qualify as a charitable trust, and to receive the associated tax and other benefits, the activities of the trust must be shown to be charitable and for the “public benefit”.¹⁸¹ Sections CW34 and CW35 of the Income Tax Act 2004, which provide tax exemptions for income of charitable entities, also specifically state that in order to qualify for tax exemptions the charitable society or trust must be established for “charitable purposes”. However before any further discussion on how charitable trusts operate in New Zealand it is first necessary to consider some of the historical background to charitable trusts to help gain an understanding of how trusts work. In a later section I will also evaluate the implications of the recently enacted Charities Act 2005.

To date there has been no clear statutory definition in New Zealand of exactly what a charity is for legal purposes¹⁸² and current interpretations continue to rely on the Charitable Uses Act 1601 (sometimes referred to as the Statute of Elizabeth I or the Poor Relief Act 1601) for guidance as to what is charitable.¹⁸³ In the case of *Special Commissioners of Income Tax v Pemsel* the House of Lords summarised the classes of charitable purpose from the Charitable Uses Act into four categories known as the four heads of charity:¹⁸⁴

“Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

¹⁸⁰ Charitable Trusts Act 1957, ss 7-8.

¹⁸¹ Watson, *supra* n 113 at 646.

¹⁸² Section 2 of the Charitable Trusts Act defines ‘charitable purpose’ as “every purpose in which is in accordance with the law of New Zealand is charitable” but this does not provide clear guidance.

¹⁸³ N. Kelly, C. Kelly, and G. Kelly, *Garrow and Kelly Law of Trust and Trustees (Sixth Edition)* (2005) 229.

¹⁸⁴ *Special Commissioners of Income Tax v Pemsel* [1891] AC 531, 583.

To qualify as a charity groups must be able to fit within one of the above four categories of charity.¹⁸⁵ The range of activities which can fit within this fourth head is quite broad and in most cases restoration groups who wish to incorporate as a charitable trust would qualify under the fourth head of charity, ‘other purposes beneficial to the community’, as conservation activities are considered to have charitable purposes beneficial to the community.¹⁸⁶ For example in *Re Verrall* a trust with the purpose of “promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest, and as regards lands for the preservation of their natural aspect, features, and characteristics” was held to be charitable following *Pemsel*.¹⁸⁷ In the New Zealand case of *Re Bruce* the Court of Appeal held that a trust for the purposes of afforestation was valid as it could be considered to have a charitable objective.¹⁸⁸ Similarly in *Kaikoura County Council v Boyd* it was held that a trust for the improvement and protection of the Waimangarara River was charitable within the fourth head of *Pemsel*.¹⁸⁹ In *DV Bryant Trust Board v Hamilton City Council* it was found that it is important that a certain degree of flexibility is maintained to allow new classes of activity to fit within the definition of charitable as the needs of society change.¹⁹⁰ Based on the case law discussed above it is likely that trusts for the purposes of restoration can be valid charitable trusts, although as it appears that the charitable status of a restoration trust has not yet been tested in the New Zealand courts it is hard to say with certainty what approach will be taken. Guidance as to the possible interpretation of the New Zealand courts may be ascertained from the approach of other common law jurisdictions that have made favourable decisions in similar situations. For example, in the Australian case of *Attorney-General (NSW) v Sawtell*¹⁹¹ Holland J held, following the Charitable Uses Act and *Pemsel*, that a trust for “the preservation of native wildlife, flora, and fauna” was beneficial to the

¹⁸⁵ von Dadelszen, *supra* n 102 at 232.

¹⁸⁶ G. Dal Pont, *Charity Law in Australia and New Zealand* (2000) 183.

¹⁸⁷ *In re Verrall* [1916] 1 Ch 100, 114.

¹⁸⁸ *Re Bruce* [1918] NZLR 16, 26.

¹⁸⁹ [1949] NZLR 233, 261.

¹⁹⁰ [1997] 3 NZLR 343, 348.

¹⁹¹ [1978] NSWLR 200.

community and therefore could be upheld as a valid charitable trust.¹⁹² Similar findings have been made in the United Kingdom in *Scott v National Trust*.¹⁹³

The test of whether or not a trust is charitable does not end there however, and there are three further requirements that must be met for a charitable trust to meet the requirements of charity law:¹⁹⁴

These are: that the trust must be for a public purpose, that it must be for the public benefit, and that it must be capable of being controlled by the Court, if necessary.

Activities which benefit a local community as a whole and fall within the “spirit and intendment” of the preamble to the Charitable Uses Act are likely to meet the first requirement if they are for a public purpose and are not limited to a narrow class of individuals.¹⁹⁵ The second test, the public benefit test, is harder to define as whether or not an activity is for the public benefit is determined by the courts on the facts of the case.¹⁹⁶ For example in *New Zealand Society of Accountants v Commissioner of Inland Revenue* the Court of Appeal held that the fidelity funds of the New Zealand Society of Accountants and the New Zealand Law Society were not charitable as they did not have objects beneficial to the community. The court felt that those who benefited from the fund were too narrow a group to meet the public benefit test.¹⁹⁷ In *Australian Conservation Foundation Inc v Commissioner of State Revenue* the Victorian Civil and Administrative Tribunal held that the Australian Conservation Foundation was “serving purposes beneficial to the community by being devoted to the conservation of the environment”.¹⁹⁸ Further the Tribunal found that conservation of the environment was within the spirit and intendment of the preamble to the Statute of Elizabeth.¹⁹⁹ Despite having ancillary political purposes the group’s purposes were held to be charitable.²⁰⁰

¹⁹² *Attorney-General (NSW) v Sawtell* [1978] NSWLR 200, 209, 214.

¹⁹³ *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 710.

¹⁹⁴ N. Richardson (ed.), *Nevill’s Law of Trusts, Wills and Administration (9th Edition)* (2004) 119.

¹⁹⁵ von Dadelszen, *supra* n 102 at 233; N. Richardson, *supra* n 194 at 121.

¹⁹⁶ N. Richardson, *supra* n 194 at 123.

¹⁹⁷ *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 153.

¹⁹⁸ *Australian Conservation Foundation Inc v Commissioner of State Revenue* [2002] VCAT 1491,

para 11.

¹⁹⁹ *Ibid*, para 12.

²⁰⁰ *Ibid*, para 23.

One of the major advantages of charitable trusts as opposed to express trusts is that charitable trusts do not have to meet the “three certainties” test.²⁰¹ An express trust is a trust that has been made by a person who has shown an intention to create a trust (the testator or settlor) by gifting his or her property to another. This type of trust usually arises out of a will upon the death of the testator.²⁰² To create an express trust it is necessary for all three certainties to exist; certainty of intention; certainty of subject matter; and certainty of objects.²⁰³ Charitable trusts are not burdened by this requirement therefore are not as easy to defeat as express trusts. Charitable trusts also overcome the rule against perpetuities which normally prevents a trust from lasting in perpetuity. This means that charitable trusts can last perpetually.²⁰⁴ These exceptions are made so that it is easier to manage charitable trusts and so that it is harder to defeat them.²⁰⁵ Because the common law position on whether or not CCGs are charitable in New Zealand is not clear it may be worthwhile for the position to be statutorily defined.

Under the Charitable Trusts Act 1957 there are two ways for an organisation to become registered. Firstly, under s 7 “trustees of any trust which is exclusively or principally for charitable purposes” can apply to the registrar for the group to be incorporated as a charitable trust board. Secondly, “a society which exists exclusively or principally for charitable purposes” may also apply to be registered as a charitable trust board under s 8 of the Act, provided it is not already incorporated under any other Act. The main structure chosen under the Charitable Trusts Act by CCGs was s 7 charitable trust, although charitable societies are another option that groups could potentially use if they wish to use an alternative model with the benefits of the trust structure.²⁰⁶ It is important to note however that these two variations under the Charitable Trusts Act result in the creation of two rather different types of

²⁰¹ Richardson, *supra* n 194 at 232.

²⁰² C. Thomas, *Forsyth's Outline of the Law Relating to Trusts, Wills, Executors and Administrators (Fifth Edition)* (2002) 115-116.

²⁰³ *Thexton v Thexton* [2001] 1 NZLR 237, 246.

²⁰⁴ *Chamberlayne v Brockett* (1872) L R 8 Ch App 206.

²⁰⁵ N. Richardson, “Charitable Trusts” in A. Butler (ed.) *Equity and Trusts in New Zealand* (2003) 251.

²⁰⁶ Agmen-Smith and von Dadelszen, *supra* n 92 at 21.

organisation in the legal sense and groups must make a carefully reasoned decision about what structure will best meet their needs before choosing to incorporate as either a charitable society or trust.²⁰⁷ As will be discussed in further detail below, it is also worth noting that incorporated societies may now apply for charitable status under the Charities Act 2005 in order to claim the income tax advantages associated with charitable status.

Similarly to the Incorporated Societies Act, trust boards that choose to incorporate under the Charitable Trusts Act gain the benefits of perpetual succession and separate legal personality under s 13 of the Act. Therefore trust boards are able to hold property, to sue and to be sued.²⁰⁸ Under s 21 of the Charitable Trusts Act the trust board of the charitable trust hold on trust, and deal with the property of the group, on behalf of the trusts beneficiaries. Section 19 also authorises the trust board to enter into contracts on behalf of the trust. The separate legal personality of the trust board may help to protect the individual members of the board from personal liability for the responsibilities of the board however this protection is not absolute and the trustees will remain liable in certain circumstances if the trust board is not correctly managed.²⁰⁹ Similarly, if a trustee has acted ultra vires then there is potential for him or her to be personally liable to the trust if the trust suffers a loss as a result of the ultra vires act.²¹⁰

Of the groups I spoke to that had incorporated as charitable trusts the majority found that the trust structure has worked well. The tax free status of charitable trusts was cited as a major advantage of this structure and similarly to incorporated societies formalising the group's structure as a trust has helped to secure funding.²¹¹ Incorporating as a charitable trust or society may also be more suitable for smaller groups, and can help them to overcome the issues some groups face with finding the

²⁰⁷ Ibid, 30.

²⁰⁸ Charitable Trusts Act 1957, s 13.

²⁰⁹ K. Ayers and D. French, "Incorporated Charitable Trusts" [1999] NZLJ 71, 71.

²¹⁰ Watson, *supra* n 113 at 640.

²¹¹ Telephone conversations with: Jim Mylchreest, Maungatautari Ecological Island Trust, 14/06/07; Rachael Goddard, Te Kauri-Waikuku Trust, 27/07/07.

number of members required to incorporate under the Incorporated Societies Act, by requiring groups to only have two trustees for a charitable trust or five members for a charitable society.²¹² There is also no fee to pay to the Registrar for a group which decides to incorporate under the Charitable Trusts Act so this may be one of the other benefits of choosing to incorporate under this Act, although as it is usual practice to have the trust deed or rules prepared by a lawyer there will remain to be some cost to this process.²¹³ Trusts may also be cheaper to operate than some of the other forms of structure available and “attract few formalities or administrative complexities”.²¹⁴

Because of their charitable status charitable trusts are provided with a number of benefits under law.²¹⁵ As part of the incorporation process under the Charitable Trusts Act s 10 requires the creation of a trust deed or similar document which sets out the rules of the group. However, unlike the Incorporated Societies Act, the Charitable Trusts Act does not provide any guidance as to how these documents should be structured. This could potentially create the difficulties described above in relation to rules of unincorporated societies, as groups may have difficulty defining their rules in a clear and effective manner. One group I spoke to has found that it has taken a significant amount of time to draft a trust deed due to the lack of guidance available and the sample trust documents available on the internet were described as “lacking teeth”.²¹⁶ It is also important for groups to know that under s 61 of the Charitable Trusts Act alteration of the rules, or other founding documents, of a trust is prohibited unless it has been provided for by those documents or is ordered by the courts. In order to prevent disputes from arising in relation to the ability groups to alter their rules it is important for groups to be aware of this provision and make allowances in the rules so the rules can be altered at a later date if the needs of the group change.²¹⁷

²¹² Chapple, *supra* n 121 at 24.

²¹³ von Dadelszen, *supra* n 102 at 225.

²¹⁴ Dal Pont, *supra* n 186 at 365.

²¹⁵ Watson, *supra* n 113 at 646.

²¹⁶ Meeting with Nancy Jensen, Otorohanga Zoological Society, 17/05/07.

²¹⁷ Agmen-Smith and von Dadelszen, *supra* n 92 at 31.

As is the case with incorporated societies it is vital that the trust deed of a charitable trust records in writing exactly how the trust is to be managed and to explain in detail the rights and obligation of the trustees. For example, in *Manukau City Council v Lawson* it was held that the trustees duties must be ascertained by interpreting the trust deed in the way that it would be understood by a reasonable person with all the background knowledge that the parties had when the trust deed was entered into and the interpretation must give effect to the natural and ordinary meaning of the deed.²¹⁸ A case which is also useful to mention here is *Sherry v Attorney General*.²¹⁹ In *Sherry* the question was whether the trustees had authority to adjust the trust deed. The trust deed provided that the trustees could in limited circumstances amend the trust deed. The trust deed foresaw the potential that in the lifetime of the trust amendments of that nature would be acceptable therefore Harrison J approved the changes.²²⁰ This case highlights the importance of drafting a trust deed to meet the requirements of the group in two ways. Firstly, if those founding the trust wish to restrain the powers of trustees to alter the rules in the future then this must be made certain when the rules are drafted. Secondly, it shows that if rules are made flexible so that the trustees can easily amend them then it may be more straight forward for the group to amend the rules as its circumstances change without the need to refer the matter to the courts.

One of the difficulties that have been described in the literature on charitable trusts incorporated under s 7 of the Charitable Trusts Act is that the trust board structure can be found by members of a group to be exclusionary as trustees are not required to answer to group members.²²¹ It is believed that there is a general misunderstanding “that a trust is a body that can have a membership”.²²² However, trusts are not membership based but are managed by the trust board on behalf of the trusts beneficiaries. It is the trustees who make the decisions on behalf of the trust in accordance with the trust deed, or in the case of a charitable society its rules, not

²¹⁸ *Manukau City Council v Lawson* [2001] 1 NZLR 599, 604-605, 608.

²¹⁹ *Sherry v Attorney General* 21/06/02, Harrison J, HC Auckland M517-SD02.

²²⁰ *Ibid*, 10.

²²¹ See for example; *Sherry v Attorney General* 21/06/02, Harrison J, HC Auckland, M517-SD02; *Manukau City Council v Lawson* [2001] 1 NZLR 599.

²²² M. Soper, “The Protector of Charities” [2002] NZLJ 57, 58.

members of a group.²²³ This does not mean that the trustees are free to make decisions for the trust as they please. On the contrary, the duties of trustees to manage the trust in accordance with the trust deed are onerous and in the event that the trustees breach their legal duties by managing the trust inappropriately then they can be personally liable for the breach and will not be protected simply because the trust is incorporated.²²⁴ Trustees managing charitable trusts are also bound by the law on trusts in the same way as trustees managing any other variety of trust, therefore obligations such as those under the Trustee Act 1956 also apply.²²⁵ It is important that new trustees are aware of their obligations under the law and have made themselves familiar with the objects of the trust and any other information relevant to the functioning of the trust.²²⁶

3. *Charities Act 2005*

The Charities Act 2005 was enacted as a means of assisting the government to maintain public trust and confidence in the charitable sector by requiring charitable entities to become registered and meet certain accounting requirements in order to gain the tax benefits conferred by charitable status.²²⁷ Section 8 of the Charities Act establishes the Charities Commission as the body responsible for the registering and monitoring of charitable entities, including societies and charitable trusts.²²⁸ Under s 10(1) of the Act the commission is given a broad range of functions including; promoting “public trust and confidence in the charitable sector”; encouraging and promoting the “effective use of charitable resources”; and educating and assisting charities in relation to “matters of good governance and management”.

Registration with the Charities Commission is voluntary; however from 1 July 2008 charitable entities must register with the Charities Commission in order to

²²³ See for example; *Sherry v Attorney General* 21/06/02, Harrison J, HC Auckland, M517-SD02; *Manukau City Council v Lawson* [2001] 1 NZLR 599.

²²⁴ Soper, *supra* n 222 at 58.

²²⁵ Dal Pont, *supra* n 186 at 356.

²²⁶ von Dadelszen, *supra* n 102 at 257.

²²⁷ K. Lord and D. McLay, *Charities Act 2005: The Real Deal* (2006) 21.

²²⁸ Charities Act 2005, s 3.

continue receiving the tax benefits conferred by CW34 and CW35 of the Income Tax Act 2004.²²⁹ Section 13 of the Charities Act sets out the essential requirements that the charitable entity must meet to qualify for registration. This includes the requirement that the entity be formed for a charitable purpose. The 2005 Act expands the common law definition of “charitable purpose” to include:²³⁰

[E]very charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

However the activities of the group must also be able to meet the public benefit test.²³¹

There are two key reporting obligations imposed on groups registered under the Charities Act. Firstly, under s 40(1) a charitable entity must notify the Charities Commission if the details of the group on the register change, for example if the group decides to change its name or if its officers change. Secondly, groups are required by s 41 to file an annual return. Groups that I spoke to did not think that these requirements were too onerous and in many cases would not require the group to take any actions in excess of what they currently do to comply with the Incorporated Societies Act. However one group that I spoke to said that there was an excessive number of forms that have to be filled in as it is necessary to complete one for each board member. This involves much repetition as the information on each form is largely the same and as the forms have to be filled in by hand this was a waste of time.²³²

D. Group Management and Planning

Another theme that recurred in the interviews I conducted was the importance of groups having good management and a good leader. Successful groups usually have a few key individuals who help to hold the group together and ensure that the necessary work gets done. Leaders must also be willing to take into account the input of other group members and to involve them in the decision making process. This helps to

²²⁹ Ibid, s 34(1B).

²³⁰ Ibid, s 5(1).

²³¹ Ibid, s 5(2)(a).

²³² Meeting with Raewyn Peart, Environmental Defence Society, 18/09/07.

facilitate group support for decisions.²³³ Having a good management committee was also cited as one of the keys to success with several participants saying that it can be helpful for there to be people on the committee with a range of different skills, from accounts management to being able to write reports and funding applications. Others stressed the importance of having a good management plan in order to secure funding and to keep to the management plan so that the work the group does is strategic.²³⁴ The literature on management structures reiterated the comments made by the groups that I spoke to. The general perception was that in order to ensure accountability to funding agencies management structures in the voluntary sector are increasingly being expected to be modelled on management structures from the government or corporate sectors.²³⁵

Jan Simmons, who works for DoC as a community group advisor, finds that there are two approaches to group management that can be successful. Firstly, some groups do much of their strategic planning prior to beginning work. This can help the group set clear objectives and can be necessary for funding applications or if groups are planning on carrying out such activities as translocation of birds. However if too much time is spent on the planning phases then members of the community may lose enthusiasm.²³⁶ The second approach is to start working and then do the planning work as it becomes necessary. Jan said that there are some groups who get started and then realise that it will be necessary to undertake a certain amount of strategic planning as the project grows so that the group can determine where the project will go to next.²³⁷ One way that management planning can contribute to group success is by providing clear guidance as to the future direction of the group.²³⁸ This helps to ensure that the CCG stays focused on their goals and achieve their objectives.²³⁹

²³³ Wilson, *supra* n 26 at 21.

²³⁴ Meetings with: Nancy Jensen, Otorohanga Zoological Society), 17/05/07; Wayne Todd, Moehau Environment Group, 02/05/07; Rachael Goddard, Te Kauri-Waikuku Trust, 27/07/07; Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07; Meeting with Wendy Jon, Friends of Oakley Creek, 14/05/07.

²³⁵ Booth, *supra* n 89 at 26.

²³⁶ Meeting with Jan Simmons, Department of Conservation, 18/05/07.

²³⁷ *Ibid.*

²³⁸ Department of Conservation, *supra* n 9 at 15.

²³⁹ Meeting with Wendy Jon, Friends of Oakley Creek, 14/05/07.

Another interesting concern of some groups is planning for succession. Several participants commented that it can be hard to find replacements for committee members in CCGs, particularly for the role of group coordinator or chairperson.²⁴⁰ In smaller Waikato communities it can be hard for groups to find the people who are prepared to join the committee when other members leave.²⁴¹ The groups that I spoke to thought that it would be wise to ensure that there is a secondary person who is knowledgeable in group matters who can step into the chairperson role if the chairperson has to leave the group on short notice.²⁴²

E. Conflict of Interest

Members of a group who serve on the management committee or trust board of a CCG are placed in a fiduciary relationship where by virtue of their position of trust and confidence duties are owed to the organisation to disclose any conflicts of interest that arise between other interests of the member and their duties to the group.²⁴³ In *R v Gough* it was held that the test for determining whether there is a conflict between interest and duty is whether “there was a real danger of bias”.²⁴⁴ This test has been accepted and applied by New Zealand courts.²⁴⁵ Liability can arise even if the trustee or committee member has not intended to act in bad faith.²⁴⁶

The duties of trustees to avoid conflict of interest were explored in detail in *Collinge v Kyd*²⁴⁷ and the principles enunciated in that case are relevant to the trustees of CCGs. Mr Collinge was a trustee of the Auckland Energy Consumer Trust, Mr Kyd

²⁴⁰ Meetings with: Nancy Jensen, Otorohanga Zoological Society, 17/05/07; Wayne Todd, Moehau Environment Group, 02/05/07; Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

²⁴¹ Meeting with Wayne Todd, Moehau Environment Group, 02/05/07.

²⁴² Meetings with: Nancy Jensen, Otorohanga Zoological Society, 17/05/07; Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

²⁴³ *Bray v Ford* [1896] AC 44, 51.

²⁴⁴ *R v Gough* [1993] AC 646, 670.

²⁴⁵ See for example; *Riverside Casino v Moxon* [2001] 2 NZLR 78; *Auckland Casino v Casino Control Authority* [1995] 1 NZLR 142.

²⁴⁶ R. Meagher, D. Heydon, and M. Leeming, *Meagher, Gummow & Lehane's Equity Doctrines and Remedies* (4th Edition) (2002) 178.

²⁴⁷ *Collinge v Kyd* [2005] 1 NZLR 847.

was the trusts chairperson. Mr Collinge and his wife acquired a number of shares in the company Vector. A situation arose where Mr Collinge would be required to vote on a matter affecting Vector. The deed of the trust provided that a trustee must not vote on a decision in which he or she is materially interested. The question in this case was whether or not Mr Collinge should be able to vote on a trust decision that could potentially affect the value of his shares or whether his participation in the voting would constitute a conflict of interest. Patterson J stated that where a trustee allows his or her duties to conflict with his or her own interests a breach of fiduciary duty may occur, in particular that:²⁴⁸

[A] decision maker should not be influenced or appear to be influenced, either consciously or unconsciously, by an interest which he or she may have.

Accordingly the court found that the nature of Mr Collinge's interest in Vector meant that he was materially interested in the Vector decision therefore he should not be permitted to vote.

In the recent case of *Diagnostic Medlab Ltd v Auckland District Health Board* Asher J stated that a conflict of interest will arise when "a person carries out a particular function with two or more interests in conflict"²⁴⁹:

In administrative law, a conflict of interest exists when a person has a private interest in a decision where that person also has a public role. In such a case the person's public role and private interest are in conflict. The result can be a poor decision because private concerns that have nothing to do with the public duty have influenced the decision.²⁵⁰

This means that a person who owes fiduciary duties to a particular organisation may not "put himself or herself in a position where his or her interest and duty conflict".²⁵¹

Because New Zealand is such a small country it is often hard for people to avoid conflicts of interest arising between their work and community activities.²⁵² In many CCGs there is a close relationship between the group and government departments.

²⁴⁸ *Ibid*, 860.

²⁴⁹ *Diagnostic Medlab Ltd v Auckland District Health Board* 20/03/07, Asher J, HC Auckland, CIV2006-404-4724 at para 122; Partially reported as *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

²⁵⁰ *Ibid*, 832.

²⁵¹ *Collinge v Kyd* [2005] 1 NZLR 847, 860.

²⁵² Office of the Auditor-General, *Managing Conflicts of Interest: Guidance for Public Entities* (2007) 2.

For a number of groups staff from DoC, or a local council, are integral members of the group either because they are a member of the group's management committee or through the provision of advice, information, resources, and support. The danger that arises here is that there may be conflicts of interest between the persons role in the CCG and their role as a staff member of a government body, for example, if the member is required to act in the best interests of a charitable trust or society in conflict with his or her duties to a local council.²⁵³

Of the people that I spoke to during the interview process the majority of people who saw conflicts of interest as being an issue thought that this was unfortunate due to the significant contribution that staff from government departments can make to the success of restoration projects.²⁵⁴ Many of the people that I spoke to said that the conflict of interest issue does not usually arise as staff and members generally understand the potential for conflict between their roles in the community and in their work, and will declare a conflict of interest or step down from the role in the event that there are any concerns.²⁵⁵ Therefore it is important to recognise that merely because a person has a role where there is potential for conflict of interest that an actual conflict of interest will not necessarily exist, particularly if the potential conflict is well managed. Justice Asher acknowledged this in the *Diagnostic Medlab* case:²⁵⁶

A conflict of interest can be benign where the person who is conflicted does not participate in making the actual decision and the decision-makers know about and understand the conflict. If the conflict is declared, the decision-makers can stand the conflicted person down in respect of certain matters, or consider input from the conflicted person while making appropriate allowances for the conflict. The ability to compensate for the conflict cannot extend to voting, however, where the conflicted person could directly influence the outcome or decision.

²⁵³ Ibid, 21.

²⁵⁴ Meetings with: Alasdair Craig, Department of Conservation, 15/05/07; Jan Simmons, Department of Conservation, 18/05/07; Wayne Todd, Moehau Environment Group, 02/05/07.

²⁵⁵ Meetings with: Alasdair Craig, Department of Conservation, 15/05/07; Nancy Jensen, Otorohanga Zoological Society, 17/05/07; Dr Michael Becker, Waitetuna Streamcare Group, 02/08/07; Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

²⁵⁶ *Diagnostic Medlab Ltd v Auckland District Health Board* 20/03/07, Asher J, HC Auckland, CIV2006-404-4724 at para 126; Partially reported as *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

One of the key duties of a committee member whose work duties may conflict with their role on the board or management committee of a CCG is to disclose the interest to the other members of the board. This is not where the duty ends however and the member must also disclose the “nature” of the conflict so that the extent of the conflict is clear to the other members.²⁵⁷ Once the conflict has been declared the group can then determine how it will be managed.²⁵⁸

It is important for the success of CCGs that they maintain public support, both in order to secure funding, and to gain volunteer support. One of the important elements of maintaining public support is to ensure that the perception of conflict of interest does not damage the group’s public image.²⁵⁹ Where there is a public perception that a conflict of interest exists this can potentially be as damaging to the groups reputation as if there was an actual conflict as the media and members of the public will often portray the conflict in a way that is far worse than the actual “offence”.²⁶⁰ The Nature Conservancy in the United States had an experience in 2003 where a perceived conflict of interest gave rise to significant media criticism that could have severely damaged the group’s reputation. These criticisms led to considerable restructuring of the trusts practices in order to maintain its public credibility.²⁶¹

From the interviews I conducted there were also some examples from groups which show the potential for conflict of interest concerns to cause legal implications for CCGs. Firstly, Wayne Todd, the project coordinator for Moehau Environment Group (MEG), said that there were members of the community who suggested that there were conflicts of interest within MEG which compromised its independence. Wayne said that certain members of the community have a negative perception of government authorities and felt that the close relationship between MEG, Environment Waikato, and DoC meant that MEG was representing the interests of

²⁵⁷ Ibid, 832.

²⁵⁸ Office of the Auditor-General, *supra* n 252 at 8.

²⁵⁹ K. Liegal, *Avoiding Conflicts of Interest and Running an Ethical Land Trust* (2006) 22.

²⁶⁰ State Services Commission, *Walking the Line: Managing Conflicts of Interest* (2005) 41.

²⁶¹ Liegal, *supra* n 259 at 75.

the government rather than those of the local community. This has never been the case. Wayne said that MEG sees itself as an independent organisation representing the local landowners, but because of the close relationship between the group and these government bodies conflict of interest has been of concern to some members of the community who formed a group that successfully opposed a pest proof fence that MEG had proposed.²⁶² This example shows how the impression that there is a conflict of interest can be damaging to a group's reputation and its ability to get work done.

The second example, which can help to show an area where groups should be cautious, was from Pirongia Te Aroaro O Kahu Restoration Society. Clare St Pierre, the group's chairperson, explained a situation where a conflict of interest had potential to cause an issue for their group. She said that the person who does most of the pest control in the town of Pirongia, and also for the group, is a member of the group's committee. Clare said that the group is always cautious to declare the relationship between the group and the pest controller when they make applications for pest management funding however a conflict arose when the group called for tenders for a pest management project they were planning. The group called for tenders for the project and set a cut off date. The committee member had failed to place a tender by the specified date so the time period was extended to allow him to place a tender. Another pest control contractor who had complied with the terms of the original tender, and who was also on the committee, complained and the group decided it should honour their original tender and give the complying tender the contract.²⁶³ This situation highlights the possibility for conflicts of interest where members of a committee are also closely involved in conservation work through their employment. The issue in this case was resolved amicably and Clare said that it is unlikely that either tenderer would have taken legal action. However had this not been so there could have been considerable legal costs for the group. Clare also said that the group were mindful that if the situation was not dealt with carefully the group could have

²⁶² Meeting with Wayne Todd, Moehau Environment Group, 02/05/07.

²⁶³ Meeting with Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

lost credibility in the community and with contractors and that this could have tarnished the image of the group as a whole. She said that the group relies on the goodwill of the local community and that this could be lost if the community gained the impression that the society does not manage its business dealings properly.²⁶⁴

To help deal with the conflict of interest issues in CCGs it is important that members, who are involved in the management side of the group, are aware what a conflict of interest means and what their responsibilities are under conflict of interest law.²⁶⁵ In New Zealand the Auditor-General has published a series of publications that provide guidance for members of local authorities²⁶⁶ and staff of public entities²⁶⁷ as to how they should manage potential conflicts of interest. The State Services Commission has also released a resource booklet into managing conflicts of interest.²⁶⁸ Both of these resources may prove useful for members of CCGs who also have a public role. Another measure that can be used to help overcome some of the issues associated with conflicts of interest is for a group to have a written conflicts of interest policy. This helps to make it clear exactly what is required by members of the group, when conflicts of interest should be disclosed, and how these conflicts should be managed.²⁶⁹ Where there is potential for a serious conflict of interest that is likely to be ongoing and may affect the credibility of the group then it is wise for a person not to be involved directly in the management committee or board or there may be damaging consequences for the group as a result of a negative public perception. In the United States the Land Trust Alliance has created an online tutorial on conflicts of interest and has made other resources on conflicts of interest available through their website so that its members can gain a better understanding of what a conflict of interest is and how to manage one.²⁷⁰ A similar resource would be beneficial to New

²⁶⁴ Meeting with Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

²⁶⁵ Liegal, supra n 259 at 69.

²⁶⁶ Office of the Auditor-General, *Guidance for Members of Local Authorities About the Law on Conflicts of Interest* (2007).

²⁶⁷ Office of the Auditor-General, supra n 252.

²⁶⁸ State Services Commission, supra n 260.

²⁶⁹ Liegal, supra n 259 at 65.

²⁷⁰ See <www.lta.org> and <www.ltanet.org> for more information (last accessed 27/08/07).

Zealand CCGs and perhaps could be produced by the State Services Commission in addition to the resources that are currently available.

F. Conclusion:

As has been shown by this part of my thesis corporate issues can create a very real concern for members and management committees of CCGs. The failure of New Zealand law to adequately take into consideration the needs of our smaller CCGs with respect to providing suitable corporate structures makes it necessary for us to consider alternative models for incorporation. This may be as simple as requiring fewer members for a group to become incorporated. It would also not require substantial revision of the current law for development of rules and trust deeds to be made easier by annexing model rules to the current statutes as has occurred overseas.

Conflict of interest is a more difficult issue to erase from the list of CCG concerns. However if it is properly managed then it should not create serious concerns for groups. A substantial part of ensuring that a conflict of interest does not create an issue for a group is for the group to put in place policies that make it clear to the committee or trust board what a conflict of interest is, when a potential conflict should be declared, and that if it cannot be resolved then the member should stand aside from that decision.

PART THREE: LAND MANAGEMENT ISSUES FOR COMMUNITY CONSERVATION GROUPS

A. Resource Management Act 1991

Throughout the remainder of this paper I will be referring to a number of the different provisions of the RMA. This part of the paper is to introduce the RMA to provide the background for the discussions that will follow. As one of New Zealand's leading pieces of environmental legislation the RMA is one of the key statutes that must be considered in respect to ecosystem restoration. The key sections of the Act are sections 5-8. Other sections key to restoration are covered in detail in the discussions that follow. Section 5 sets out the purpose of the RMA as "to promote the sustainable management of natural and physical resources":

In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

Section 6 sets out a number of matters of national importance that must be considered by those exercising functions and powers under the Act. These include:

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;
- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development;
- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers;
- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
- [(f) the protection of historic heritage from inappropriate subdivision, use, and development.]
- [(g) the protection of recognised customary activities.]

These matters are clearly of significance to the restoration of indigenous ecosystems in New Zealand and help to provide a basis upon which regulation to protect ecosystems can be justified. Section 7 covers other matters that decision makers must pay particular regard to when making decisions under the Act. Of particular

importance with regards to ecosystem restoration is s 7(d) which requires the consideration of the “intrinsic values of ecosystems”. Finally section 8, which will be discussed in more detail below, sets out how Treaty of Waitangi obligations should be considered.

B. Legal Protection for Restoration Projects

1. Introduction

Within the vision of many of New Zealand’s CCGs is a goal to help restore and conserve New Zealand’s native biodiversity so that it can be enjoyed for future generations. A number of legislative and regulatory measures have been put in place to help ensure that significant natural areas on both public and private land are protected. However one of the issues that came up both in the interviews that I conducted and in the literature on ecosystem restoration was the fact that some CCGs are failing, for a variety of reasons, to gain protection for the areas of land that they are restoring. This part of this paper will explore the reasons why some groups are failing to acquire formal legal protection for their projects and will explain the possible implications of this. I will also provide a brief overview of the legal mechanisms currently available to provide protection for restoration projects and evaluate the strengths and weaknesses of these mechanisms. Finally, I will suggest some ways that the law could be modified to help ensure that restoration works can be legally protected for future generations.

2. Protection on Private Land

While a significant proportion of New Zealand’s restoration activities take place on public land, there are also a large number of groups undertaking restoration work on private land. Ensuring protection of ecosystems on a wide scale requires legislative and regulatory instruments to consider a broader environment than just focussing on publicly owned lands but must also take into account the importance of ecosystems on privately owned land. Considering ecosystem management in a broader scale can

help to ensure the integrity of a wider range of ecosystem elements.²⁷¹ Restoration on private land is an important factor in maintaining New Zealand's biodiversity as there are significant habitats on private land that are not necessarily represented within the public conservation estate.²⁷² Small fragments of native bush on private land often provide linkages between larger ecosystems and can be important stepping stones for species travelling between larger ecosystems.²⁷³ Ensuring that ecosystems existing on private land are afforded adequate legal protection on a long term basis²⁷⁴ is vital to ensuring that the diversity of New Zealand's indigenous ecosystems is maintained because many important ecosystems are present on land that is not necessarily represented in public conservation lands.²⁷⁵

To date co-operation between CCGs, landowners, and government agencies has already resulted in over 245 landowners in the Waikato region taking steps to legally protect areas of native bush on their land through such mechanisms as QEII open space covenants and nga whenua rahui kawenata.²⁷⁶ However significant areas of natural habitat exist on private land without any protection and some lack the maintenance required to ensure their long term viability. To increase the level of protection and restoration on private land Mairi Jay of Tui 2000 and Friends of Barrett Bush suggests that more should be done to encourage private landowners to get involved or to allow community groups onto their land to do the work.²⁷⁷

A recurring theme in the interviews I conducted, and in the literature that I studied, was that in many cases protection of restoration sites is largely due to the goodwill of

²⁷¹ S. E. Curran, "The Preservation of the Intrinsic: Ecosystem Valuation in New Zealand" (2005) 9 NZJEL 51, 83.

²⁷² Ministry for the Environment, *Protecting our Places: Information About the Statement of National Priorities for Protecting Rare and Threatened biodiversity on Private Land* (2007) 3.

²⁷³ D. Farrier, "Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations" (1995) 19 Harvard Environmental Law 303, 319.

²⁷⁴ D. Campbell-Hunt, *Developing a Sanctuary: The Karori Experience* (2002) 43.

²⁷⁵ Ministry for the Environment. *A Snapshot of Council Effort to Address Indigenous Biodiversity on Private Land* (2004) 3.

²⁷⁶ Environment Waikato. *Protection* available at <www.ew.govt.nz> (last accessed 16 May 2007).

²⁷⁷ Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

landowners and their choice to informally protect native ecosystems on their land,²⁷⁸ or because it has not yet been considered economic to develop the land.²⁷⁹ While the goodwill of a landowner in providing a licence for protection may ensure an informal safeguard during the tenure of that landowner, unless formal legal protection is sought also, then there is no guarantee that protection will be maintained into the future.²⁸⁰ In most cases the agreement is what can be described as a bare licence, “a privilege granted by one person to another to do something which would otherwise be unlawful”, which can generally be revoked at any time.²⁸¹ A current or future landowner may withdraw the licence rights and therefore have a detrimental effect on the ability of a group to protect conservation areas. Therefore it is desirable for groups carrying out restoration projects on private land to take all available steps to facilitate the adoption of legal protection of the site.

However, while legal protection may appear, *prima facie*, to be a simple solution to ensure that restoration plantings are maintained in perpetuity, closer examination of the current protection mechanisms shows that these instruments are not always easily accessible to CCGs and may prevent formal protection being sought. High implementation costs can discourage landowners and put protection mechanisms outside of the means of some CCGs.²⁸² Many of the schemes currently available also lack the funding they need to be able to expand their activities to a broader scale.²⁸³

3. Protection Measures for Private Land

Studies of restoration activities on private land in different countries suggest that there is no one mechanism which can, in isolation, effectively ensure biodiversity on

²⁷⁸ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

²⁷⁹ Ministry for the Environment, *supra* n 24 at 140.

²⁸⁰ C. Cocklin, and P. Davis, *Protecting Habitats on Private Land: Perspectives from Northland, New Zealand* (2001) 26-27

²⁸¹ G. W. Hinde, D. W. McMorland, N. R. Campbell, and D. P. Grinlinton, *Land Law in New Zealand (Volume 2)* (2004) 782.

²⁸² Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

²⁸³ Ministry for the Environment, *Bio-what? Addressing the Effects of Private Land Management on Indigenous Biodiversity* (2000) 22.

private land is maintained, restored and managed.²⁸⁴ Rather what is required is an integrated approach which uses a mixture of policy instruments to ensure that there is a backup if some of the mechanisms have weaknesses and fail to achieve the expected outcome, without resorting to the “kitchen sink” approach.²⁸⁵ The mixture must also include a combination of “carrots and sticks”, incentives and regulation.²⁸⁶ Neil Gunningham and Mike Young have used the analogy of aircraft design to explain the need for an integrated policy mix to protect biodiversity on private land.²⁸⁷

The logic is similar to that of aircraft design. Because of the consequences of the failure of a single system without backup would be catastrophic, aircraft design deliberately incorporates multiple systems to compensate for the possible failure of any one in particular. Generally, those mixes that involve more rather than fewer instruments are likely to be more effective in preventing irreversible loss. Put differently, emphasis on dependability and precaution means that the most effective instrument mix will include mechanisms and instruments that appear to be redundant because, from time to time, some are expected to fail.

It is also important that consideration is given to how the range of instruments will interact with each other, as some instrument combinations will be complementary whereas others may be counterproductive.²⁸⁸ Gunningham and Sinclair propose that the range of instruments used should be sequenced. This means that where one type of instrument fails there should be a complementary method of protection available to back up the voluntary and less “interventionist” mechanisms. For example, where protection by covenant fails, there should be regulations in place to ensure that there is a back up form of obtaining protection.²⁸⁹

Landowners are unlikely to respond well to mechanisms that they consider as a threat to their economic well being, for example, mechanisms that require parts of their land

²⁸⁴ N. Gunningham and M. D. Young “Toward Optimal Environmental Policy: The Case of Biodiversity Conservation” (1997) 24 *Ecology Law Quarterly* 243, 245.

²⁸⁵ N. Gunningham and D. Sinclair, “Integrative Regulation: A Principle-Based Approach to Environmental Policy” (1999) 24 *Law and Social Inquiry* 853, 859-860.

²⁸⁶ Farrier, *supra* n 273 at 309.

²⁸⁷ Gunningham and Young, *supra* n 284 at 280-281.

²⁸⁸ Gunningham and Sinclair, *supra* n 285 at 856.

²⁸⁹ *Ibid*, 871.

to be taken out of production or decrease the value of the land.²⁹⁰ Therefore in order to increase landowner acceptance of conservation mechanisms it is important to decrease the financial risks associated with their uptake. This is where financial incentives are important.²⁹¹ Management is also an essential part of restoring biodiversity therefore in considering what instruments will be appropriate for the protection of conservation areas it is necessary to provide for the ongoing management of the protected area.²⁹² To help facilitate on-going management it is important that when developing a scheme consultation is undertaken with the landowners who will be affected in an attempt to secure their support.²⁹³

New Zealand has a variety of legal mechanisms in place which aim to ensure long term protection of biodiversity on private land. These instruments have some potential for protecting restoration projects carried out by CCGs on private land. However, while these measures have protected large tracts of native habitat and wildlife there are still significant gaps which decrease the effectiveness of the legislative and regulatory framework for biodiversity conservation and protection on private land. In this section I will evaluate the mechanisms currently used in New Zealand to protect conservation areas on private land. I will then move on to a discussion of some possible improvements to New Zealand law in this area with examples from overseas jurisdictions.

(a) Conservation Covenants and other current mechanisms

One method commonly used to protect conservation areas on private land is conservation covenants. Covenants are defined as being “a promise made under a seal, that is, in a deed”.²⁹⁴ Conservation covenants are voluntary agreements, entered into usually between a government agency or covenanting organisation, for the

²⁹⁰ T. Kabii and P. Horwitz, “A Review of Landholder Motivations and Determinants for Participation in Conservation Covenanting Programmes” (2006) 33 *Environmental Conservation* 11, 12.

²⁹¹ *Ibid*, 14.

²⁹² Farrier, *supra* n 273 at 323-326.

²⁹³ Ministry for the Environment, *supra* n 283 at 27.

²⁹⁴ Hinde, McMorland, Campbell, and Grinlinton, *supra* n 281 at 725.

protection and/or management of biodiversity on private land.²⁹⁵ Ownership of the property is maintained by the landowner while an interest in the land is provided to the covenanting body.²⁹⁶ Covenants for conservation purposes are available in New Zealand under the Conservation Act 1987, the Reserves Act 1977, the Queen Elizabeth the Second National Trust Act 1977 (QEII Trust Act), and in some areas through the local authorities as a condition of subdivision consents.²⁹⁷

While QEII publications generally state that covenants are registered on the title of a property, in a technical sense covenants are actually noted on the title of the property upon which the protected area is located to give notice to those who search the register of the covenants existence.²⁹⁸ With the exception of *nga whenua rahui kawenata* covenanting usually means that the area will be protected in perpetuity in accordance with the terms of the covenant agreement.²⁹⁹ This means that the future owners of the property will be bound to observe the terms of the covenant and therefore will, in the majority of cases, ensure that protection of the natural area is maintained.³⁰⁰

A major barrier to the success of CCGs in securing conservation covenants on private land is convincing landowners of the need to use formal mechanisms in order to secure long term protection. Many landowners provide informal protection for areas of native bush on their land and consider that that is enough to protect the area, and that legal protection is unnecessary.³⁰¹ Other landowners are simply unwilling or unable to provide protection and fear that formalising protection may either make resale of the property difficult or reduce the value of the land.³⁰² Some landowners

²⁹⁵ D. Donahue, "The Law and Practice of Open Space Covenants" (2003) 7 NZJEL 119, 121.

²⁹⁶ Ibid, 124-125.

²⁹⁷ Department of Conservation. *supra* n 9 at 11.

²⁹⁸ Queen Elizabeth the Second National Trust Act 1977, s 22(7).

²⁹⁹ Conservation Act 1987, s 27A(1)(b); Reserves Act 1977, s 77A(1)(b).

³⁰⁰ Queen Elizabeth the Second National Trust Act 1977, s 22(5).

³⁰¹ C. Cocklin, and P. Doorman, "Ecosystem Protection and Management in New Zealand: A Private Land Perspective" (1994) 14 Applied Geography 264, 275.

³⁰² C. Voigt, "Protection of Indigenous Forests on Private Land – Role of Local Government" (2003) 7 NZJEL 169, 198.

also fear losing ownership and management rights over covenanted areas.³⁰³ However under QEII for example, landowners retain ownership of the covenanted areas and have to right to continue to manage the land provided they do so in accordance with the terms of the covenant.³⁰⁴ There is also no requirement for landowners to allow public access to covenanted areas and people wishing to gain access to covenanted areas on private land must gain permission of the landowner.³⁰⁵

(i) QEII National Trust Act 1977

Queen Elizabeth the Second Open Space Covenants (QEII covenants) are the main type of protection used on private land in New Zealand. QEII covenants are administered by the Queen Elizabeth the Second National Trust (QEII Trust) under Queen Elizabeth the Second National Trust Act 1977 (QEII Trust Act). Section 22 of the QEII Trust Act empowers the trust to enter into covenant agreements with private landowners:

Where the Board is satisfied that any private land, or land held under Crown lease, ought to be established or maintained as open space...the Board may treat and agree with the owner or lessee of the land for the execution by the owner or lessee in favour of the Trust of an open space covenant on such terms and conditions as the Board and the owner or lessee may agree.

QEII covenants are voluntarily entered into by landowners with each covenant varying depending on the terms agreed between the parties. While most QEII covenants are in perpetuity the Act allows for covenants to be registered for a limited period of time depending on the status of the land upon which the covenant applies.³⁰⁶ Covenants which are not in perpetuity were a concern for some of the people that I spoke to as it means that there is no guarantee that the land will remain protected into the future therefore there are no guarantees that the work a group does will be protected indefinitely.³⁰⁷ In most cases the covenant will be in favour of a

³⁰³ Meeting with Judy Van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

³⁰⁴ QEII National Trust. "Helping You Protect the Special Nature of Your Land" *Open Space: Magazine of the Queen Elizabeth II National Trust*, April 2002, 27.

³⁰⁵ *Ibid*, 27.

³⁰⁶ Queen Elizabeth the Second National Trust Act 1977, s 22(5).

³⁰⁷ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

small segment of land which requires protection, however in some cases the covenant will be for a whole property.³⁰⁸ To determine whether a property has characteristics worthy of protection a QEII representative will visit the site to evaluate it. Trust practice is to assess the land on the basis of the following criteria:³⁰⁹

[E]cological and biodiversity value, naturalness, sustainability, existing or potential value as an ecological corridor, wildlife, geological features, landscape values, cultural and heritage values. There will also be practical considerations including: management needs, threats to site values, [landowner] motivation and potential sources of funding.

However the criteria are not limited to those stated above and the QEII trust board can take into account other factors that they consider are relevant to whether or not a QEII covenant is justified. If the trust can be satisfied that the area in question meets the assessment criteria, the covenant will be approved, and once any fencing or surveying requirements have been completed, the covenant will be noted by the District Land Registrar on the title of the property concerned.³¹⁰

One of the concerns that I have with the criteria used to evaluate land under the QEII Trust Act is that it is not entirely clear what the threshold is for land to qualify for protection under the Act. In my opinion this may mean that there are restoration sites on private land that are deserving of QEII protection but which do not meet the criteria because they do not have the requisite ecological value described in the criteria. For example, it is not clear whether a restoration project that is redeveloping a site from scratch will be able to meet the covenant criteria used by the trust whereas it appears from s 22 of the Act that it probably should fit within the definition of “open space” provided in section 2 of the Act:

Open space means any area of land or body of water that serves to preserve or to facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic, scientific, or social interest or value

This is concerning as it may mean that if land that is being restored is to be sold to a less conservation minded landowner then there are very few options for ensuring that it is legally protected.

³⁰⁸ QEII National Trust, *QEII Open Space Covenants* available at <www.qe2.org.nz> (last accessed 10/05/07).

³⁰⁹ QEII National Trust, *supra* n 304 at 27.

³¹⁰ Queen Elizabeth the Second National Trust Act 1977, s 22(7).

QEII covenants have, in most areas, been a successful mechanism for the protection of open space on private property,³¹¹ with 378 covenants having been registered in the Waikato region as of 1 February 2007, and a further 102 approved and awaiting registration. The total land area protected in the Waikato by QEII covenants totals approximately 15,000 hectares.³¹² Over the entire country there have been a total of 2532 covenants registered, and 607 approved, protecting a total area of 99,773 hectares.³¹³ It is thought that the work of the trust has also helped to contribute to increased awareness of the need for legal protection not only by CCGs and landowners but also by local authorities.³¹⁴ The trusts success can be partially evidenced by the fact that there have always been more landowners applying for covenants than what the QEII Trust is able to fund.³¹⁵ However, while the Waikato Region overall has a relatively high number of QEII covenants registered in comparison to other parts of the country, Hamilton City is notably lacking in QEII covenant protection. By district Hamilton City appears to have the lowest number of registered covenants in the North Island.³¹⁶ This is concerning as it is many of the ecosystems in and surrounding urban areas that are in most need of protection,³¹⁷ although there are numerous parks and reserves in council ownership in Hamilton city that may help to compensate for the lack of QEII protection. Another issue in relation to QEII covenants is the time that it takes for covenants to be approved and registered, for some covenants up to several years.³¹⁸ While government funding of the QEII Trust has been on the rise so too has the demand for covenants and at present the trust is “over-subscribed”.³¹⁹

³¹¹ Cocklin, and Doorman, supra n 301 at 267.

³¹² QEII National Trust. *30 Years of QEII Open Space Covenants* available at <www.qe2.org.nz> (last accessed 10/05/07).

³¹³ Ibid.

³¹⁴ Cocklin, and Doorman, supra n 301 at 267.

³¹⁵ M. A. Bayfield, *QEII National Trust Working with Local Government Discussion Paper: Report for QEII National Trust and Local Government New Zealand* (2004) 3.

³¹⁶ Ibid, 11.

³¹⁷ D. Walker, R. Price, D. Rutledge, R. T. T. Stephens and W. G. Lee, “Recent Loss of Indigenous Cover in New Zealand” (2006) 30 *New Zealand Journal of Ecology* 169, 175.

³¹⁸ Cocklin, and Doorman, supra n 301 at 275.

³¹⁹ P. Clough, *Treasury Working Paper 00/25: Encouraging Private Biodiversity – Incentives for Biodiversity Conservation on Private Land* (2007) 5.

To assist in the facilitation of QEII covenants the trust contributes towards the costs incurred by landowners as a result of entering into the agreement. This contribution may include costs for legal advice, fencing and surveying³²⁰ although survey and legal costs will not be covered if the covenant is being entered into in order to obtain subdivision rights.³²¹ However the trust does not contribute to the maintenance costs of the area once the covenant is in place. While the trust covers a portion of the costs of covenanting there are often considerable costs to the landowner or conservation group seeking covenant protection. This can act as a deterrent to those who may otherwise seek QEII covenant protection.³²² For example, the costs of surveying are not always met by the QEII Trust and landowners are often not willing or able to pay.³²³ CCGs working on private land generally will contribute to the costs of covenanting or maintaining covenanted areas however additional money to cover the costs surveying or fencing is often not available. This can restrict the ability of some groups to procure covenant protection.³²⁴ Under section 21(2)(e) of the QEII Trust Act the trust is also given the authority to pay rates on land which has been covenanted under the Act. However the trust has never used this power.³²⁵

There is currently very little economic incentive for landowners to enter into QEII covenants³²⁶ and unless the economic balance is put more in their favour many landowners will continue to be discouraged by the cost of covenanting.³²⁷ The QEII Trusts limited funding means that they are not able to provide further support.³²⁸ Therefore in order to increase the uptake of QEII covenants on private land costs either need to be reduced, or increased funding be provided to the QEII Trust so landowners and CCGs are not required to fund such a high proportion of the cost of

³²⁰ QEII National Trust. *How to Covenant Your Special Areas* available at <www.qe2.org.nz> (last accessed 10/05/07).

³²¹ Cocklin, and Davis, *supra* n 280 at 23.

³²² Cocklin, and Doorman, *supra* n 301 at 275.

³²³ Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

³²⁴ *Ibid.*

³²⁵ Donahue, *supra* n 295 at 133.

³²⁶ *Ibid.*

³²⁷ Meeting with Wayne Todd, Moehau Environment Group, 02/05/07.

³²⁸ Donahue, *supra* n 295 at 131-132.

covenanting their land.³²⁹ Another way that the costs of covenants to landowners could be reduced would be to use a range of economic incentives which reduce the actual amount of expenditure that the landowner must make from their own resources.³³⁰ These mechanisms are discussed below in relation to possible improvements to New Zealand law.

(ii) Enforcement and Monitoring of QEII Covenants

For any mechanism to be truly effective it is important that enforcement and monitoring mechanisms are in place so that in the event of a breach of conditions occurring that the mechanism will be enforced against the breaching party. The QEII Trust usually monitors covenanted properties every two years³³¹ however there is some concern that this level of monitoring is not likely to ensure that covenants are properly enforced and it would be more appropriate if the trust were to visit properties on an annual basis.³³² Donahue, in her research on QEII covenant enforcement, found no record of any cases where the QEII Trust had sought to enforce a QEII covenant and that overall “indications are that enforcement activity has been minimal”.³³³ In my own research I likewise was unable to locate any cases where the QEII Trust had taken legal action to enforce covenants.³³⁴ In one case a QEII representative was recorded as saying the QEII Trust would sue a quarry developer whose activities may have an adverse effect on a nearby covenanted area,³³⁵ but it appears that there are no reported cases to evidence action having been taken. One reason which has been cited by Debra Donahue as to why the trust is reluctant to enforce covenants against landowners is that if they are seen to be too strict on enforcement then it is possible that landowners may be reluctant to enter into QEII covenants at all. Donahue also argues that one of the other major reasons for lack of monitoring and enforcement by QEII is a lack of resources both in terms of funding and staffing numbers. This problem is likely to increase over time, as the

³²⁹ Cocklin and Davis, *supra* n 280 at 60.

³³⁰ Gunningham and Young, *supra* n 284 at 263.

³³¹ QEII National Trust, *supra* n 308.

³³² Donahue, *supra* n 295 at 155.

³³³ *Ibid.*

³³⁴ As at 27 August 2007.

³³⁵ *J. Crooks and Sons v Invercargill City Council* 08/08/97, Skelton J. EC Christchurch C81/97, 41.

number of covenants increase, unless the QEII Trusts resources are significantly increased,³³⁶ or alternative mechanisms are put in place to ease the burden on the trust. As will be discussed shortly conservation easements may be one such alternative.

(iii) Conservation Act 1987

Under the Conservation Act there are three mechanisms that can be used to protect restoration works on private land. These are conservation covenants, nga whenua rahui kawenata, and management agreements.³³⁷ Under s 27 of the Act conservation covenants may be entered into in favour of the Minister of Conservation over private land which is to be protected for conservation purposes. As with QEII covenants this type of covenant will run with the land and therefore is binding on successors in title to the property. Once agreed the covenant is also noted on the title of the concerned property.³³⁸ These covenants are similar to those used under the Reserves Act discussed below.

Where Maori land is to be protected for conservation purposes the Minister of Conservation is given the authority under s 27A of the Conservation Act to negotiate with the owners of the land for nga whenua rahui kawenata, a form of conservation covenant, to be entered into for the land concerned. While nga whenua rahui kawenata may be entered into in perpetuity s 27A(1)(b) of the Act provides the option for the agreement to either be for a specified term or otherwise to be reviewed at interval of not less than every 25 years so that tangata whenua are given the option to modify or extinguish the agreement. Finally, under s 29 the Minister of Conservation is given the authority to enter into an agreement with the owner any land which is to be managed for the protection of a natural or historic resource.

³³⁶ Donahue, supra n 295 at 155-156.

³³⁷ Conservation Act 1987, ss 27, 27A and 29.

³³⁸ Ibid, s 27(2).

(iv) Reserves Act 1977

In most cases Reserves Act protection applies only to publicly owned land, however there are a number of exceptions which may allow a degree of protection provided that the landowner provides consent.³³⁹ Section 38 of the Act authorises the Minister of Conservation to enter into an agreement with a landowner for parts of their land to be managed under sections 17-23 of the Act and in accordance with a management agreement entered into between the landowner and the Minister.³⁴⁰ These agreements are between the parties and will not bind future landowners therefore will not ensure any long term protection.³⁴¹

Section 76 of the Reserves Act can also be used to secure reserves protection on private land through the formation of a protected private land agreement (PPLA). These agreements are entered into between a landowner and the Crown if the Minister is satisfied that the land in question deserves protection because of its “natural, scientific, scenic, historic, cultural, archaeological [or] geological” value.³⁴² It is also necessary for the landowner to “satisfy the Department that they can maintain protection and that PPLA status is in the public interest”.³⁴³ A benefit of this method is that like with conservation covenants. The agreement is registered on the title of the property and will be binding on future landowners.³⁴⁴ However, as with many of the other mechanisms the issue for CCGs is that unless they own the land that they are working on, the protection is subject to landowner action.

The Reserves Act provides two other forms of covenant protection as an alternative to those offered under the Conservation Act and the QEII Trust Act. The first are conservation covenants under s 77. These covenants are similar to Conservation Act

³³⁹ K. Booth, and M. Bellingham, “Public Access and Protection on Private Land” in R. Harris (ed.), *Handbook of Environmental Law* (2004) 439.

³⁴⁰ Reserves Act 1977, s 38.

³⁴¹ Ibid, s 38(1).

³⁴² Ibid, s 76.

³⁴³ Booth, and Bellingham, *supra* n 339 at 439.

³⁴⁴ Reserves Act 1977, s 76(4).

covenants,³⁴⁵ can be entered into in perpetuity, or for a defined term, and once registered can bind successors in title.³⁴⁶ The second variation of covenant can be found in s 77A. Under s 77A provision is made for *nga whenua rahui kawenata*, also similar to those under the Conservation Act, to be entered into for the protection of conservation areas of Maori land. This section of the Act was inserted in 1993³⁴⁷ due to the dissatisfaction among Maori regarding the other protection mechanisms that were available.³⁴⁸ Kawenata help to ensure that biodiversity is protected on Maori land without unduly encroaching on *tino rangatiratanga* of future generations.³⁴⁹ Kawenata can also provide for limited access to resources for customary cultural purposes.³⁵⁰

(v) Local Authorities

Local authorities are required, under the RMA, to put in place measures to ensure the “maintenance of indigenous biological diversity”.³⁵¹ It is important, that in developing planning instruments and allowing development activities under the RMA, that authorities find the correct balance between development and conservation to ensure that biodiversity is protected.

Under the RMA councils are given the authority to place conditions on resource consents so that landowners who propose to develop a site, which is significant to the protection of biodiversity, would be required to make a financial contribution either to the protection of the area on their land or towards restoration activities being carried out in the district as a measure for countering the adverse effects of development.³⁵² Under s 108(1) of the RMA, local authorities are given the authority to require persons applying for resource consents to comply with any conditions that the authority deems appropriate. Section 108(2) sets out a number of different

³⁴⁵ Booth, and Bellingham, *supra* n 339 at 439.

³⁴⁶ Reserves Act 1977, s 76(2), (3) and (4).

³⁴⁷ Reserves Amendment Act 1993, s 3.

³⁴⁸ Cocklin, and Davis, *supra* n 280 at 24.

³⁴⁹ *Ibid.*

³⁵⁰ Department of Conservation, *Nga Whenua Rahui Fund* available at <www.doc.govt.nz> (last accessed 7/09/07).

³⁵¹ Resource Management Act 1991, s 31(1)(b)(iii).

³⁵² Booth, and Bellingham, *supra* n 339 at 440.

examples of what kind of conditions will be appropriate. For example, landowners who choose to subdivide or develop land can be required to make a financial contribution to the local authority as a condition of resource consent under s 108(2)(a). Section 108(9) states that financial contributions can either be required in the form of land, or in money. Under s 108(2)(b) a bond may be required from a developer to ensure that a development is carried out in accordance with the resource consent.³⁵³ This enables a consent authority “to carry out work that the consent holders ought to have done, and recoup their costs” but is not a suitable provision to use to protect vegetation through consent conditions. Section 108(2)(c) appears to have the potential to be particularly useful for biodiversity protection in that it can require, as a condition of resource consent:

[T]he protection, planting, or replanting of any tree or other vegetation or the protection, restoration, or enhancement of any natural or physical resource.

One of the key cases on s 108 is *Waitakere City Council v Estate Homes Ltd*. In that case Estate Homes had applied for a subdivision consent, and as a condition of granting consent Waitakere City Council required an arterial road to be built. Estate Homes objected to the condition and appealed the Council decision. On appeal the Supreme Court held:³⁵⁴

In order for that requirement to be validly imposed it had to meet any relevant statutory stipulations, and also general common law requirements that control the exercise of public powers. Under these general requirements of administrative law conditions must be imposed for a planning purpose, rather than one outside the purposes of the empowering legislation, however desirable it may be in terms of the wider public interest. The conditions must also fairly and reasonably relate to the permitted development and may not be unreasonable.

This case is significant as it limits the authority of a council to require development contributions while allowing them to request reasonable contributions. Reasonable contributions can include those that will protect native bush. For example, in *Morgan v Whangarei District Council* the Environment Court had to consider how s 108(2)(c) should be applied to an application for resource consent to develop land where native

³⁵³ Resource Management Act 1991, s 108A(1).

³⁵⁴ *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, 172.

bush was present. The approach that the court took is favourable to protection and restoration of native bush:³⁵⁵

It seems to us that it is not hard to accept that conditions that have as their purpose the protection of existing vegetation, come within the words of the subsection “*the protection...of any tree or other vegetation*”. Neither does it seem to require any stretch to accept that the concept of weed and pest control would be covered by the words “the protection, restoration, or enhancement of any natural...resource”.

Under s 108(2)(d) covenants in favour of the consent authority are another type of condition that councils may require in exchange for rights to subdivide. These covenants require landowners to put protective covenants in place in favour of a district council in order to be granted subdivision consent.³⁵⁶ A downside to this form of covenant, however, is that additional residential development close to conservation areas may lead to increased numbers of predators being brought into the area in the form of domestic animals such as cats.³⁵⁷

There are, however, limitations on the extent to which a council can claim contributions under s 108.³⁵⁸ For the conditions to be enforceable by the council they must first comply with the tests established in *Newbury District Council v Secretary of State for the Environment*:³⁵⁹

[T]he conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed.

The first requirement was interpreted in *Bletchley Developments Ltd v Palmerston North City Council (No1)*. The planning tribunal held that a council decision to require a developer to build a road was “plainly related to the service of future development beyond the subdivision” and therefore was not a valid condition in accordance with the *Newbury* test.³⁶⁰ In relation to the second step the planning tribunal in *Nugent Consultants v Auckland City Council* held that to be relevant the

³⁵⁵ *Morgan v Whangarei District Council* 27/11/06, Newhook LJ, EC Whangarei ENV-2006-AKL-000356, 16.

³⁵⁶ Resource Management Act 1991, s 108(2)(d).

³⁵⁷ Cocklin, and Doorman, *supra* n 301 at 277.

³⁵⁸ D. Nolan and N. Christie, “Financial Contributions as a Market Mechanism and the Resource Management Act 1991” (1999) 3 NZJEL 127, 134-136.

³⁵⁹ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599-600.

³⁶⁰ *Bletchley Developments Ltd v Palmerston North City Council (No1)* [1995] NZRMA 337.

condition must “avoid or at least substantially mitigate, any adverse effects on the environment’.³⁶¹ Similarly, in *Woodridge Estates Ltd v Wellington City Council* Treadwell CJ held that it was “grossly inequitable and unfair” for the council to claim a maximum cash contribution for every cross lease within a subdivision.³⁶² Finally, in relation to step three, the standard of unreasonableness is the *Wednesbury* standard, that is, that the council’s decision must be “so absurd that no sensible person could ever dream that it lay within the powers of the authority’”.³⁶³

Consent conditions as a method of biodiversity protection have the potential to be successful tools in New Zealand. This method of ensuring protection was successfully implemented at Barrett Bush where a significant portion of native bush on private land was transferred as a condition of subdivision under the Waipa District Plan.³⁶⁴ This has added to the size of Barrett Bush without the need for Friends of Barrett Bush to find additional funds to purchase an area which bordered on the area where the group has already undertaken considerable restoration work. Friends of Barrett Bush Coordinator, Mairi Jay, suggested that if other local authorities were to enact rules in their district plans which required conditions on subdivision consents in areas containing important areas of native bush then the work of CCGs could be aided significantly.³⁶⁵

Under the Local Government Act 2002 (LGA) territorial authorities are provided with an alternative to s 108 of the RMA for gaining financial contributions from developers that can be applied to conservation purposes. Section 198(1)(a) of the LGA allows a territorial authority to request a development contribution when a resource consent is granted within the district. Under s 199 these contributions may be required if:

[T]he effect of the development is to require new or additional assets or assets of increased capacity and, as a consequence, the territorial authority incurs capital expenditure to provide appropriately for:

³⁶¹ *Nugent Consultants v Auckland City Council* [1996] NZRMA 481, 485.

³⁶² *Woodridge Estates Ltd v Wellington City Council* [1993] 2 NZRMA 656, 660.

³⁶³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.

³⁶⁴ Waipa District Council, *Operative Waipa District Plan 1997*, Rules 10.3.2.2(f) and 10.6.1.4(f).

³⁶⁵ Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

- (a) reserves:
- (b) network infrastructure:
- (c) community infrastructure.

However before a council is able to require development contributions they must develop a contributions policy under s 102(4)(d) of the LGA.³⁶⁶

Under s 200(1) of the LGA a territorial authority cannot claim a development contribution under the LGA if it has already “imposed a condition on a resource consent in relation to the same development for the same purpose under s 108(2)(a) of the RMA or of the developer or another third party will provide funding for the “same reserve, network infrastructure, or community infrastructure”. Under s 203(1) maximum development contributions for reserves must not exceed either “7.5% of the value of the additional allotments created by a subdivision” or:³⁶⁷

...the value equivalent of 20 square metres of land for each additional household unit created by the development” and contributions received by the territorial authority for reserves must be used “for the purchase or development of reserves within its district.

This can include making payments to the “administering body of a reserve held under the Reserves Act 1977” or to secure an “interest in perpetuity in land for conservation purposes”.³⁶⁸

In *Neil Construction Limited v The North Shore City Council* the Court held that the test for whether development contributions may be required is as follows:³⁶⁹

- Step 1 Is the subdivision or development a “development”, i.e. does it generate a demand for reserves or infrastructure? (s 197 definition)
- Step 2 Does the development (either alone or cumulatively with another development) require new or additional assets of increased capacity to provide for reserves or infrastructure which will cause the council to incur capital expenditure (s199(1)) or has already caused the council to incur capital expenditure for the development? (s199(2))
- Step 3 Is there an alternative source of funding? (s 200).

³⁶⁶ Local Government Act 2002, s 198(2).

³⁶⁷ Ibid, s 205.

³⁶⁸ Ibid.

³⁶⁹ *Neil Construction Limited v The North Shore City Council* 27/03/07, Potter J, Unreported HC Auckland CIV-2005-404-4690, para 113.

The Court found in that case the lack of “direct causal nexus between the “development” and the demand for infrastructure” meant that the council had not met this test.³⁷⁰

(b) Improving Uptake of Conservation Measures on Private Land

(i) Introduction

At present many of the protection mechanisms available in New Zealand are voluntary and are heavily reliant on the goodwill of landowners.³⁷¹ The onus and cost of protecting areas of native bush is also largely placed on landowners despite the fact that restoration and protection is for the public good.³⁷² The problem with taking this approach to private land is that there will always be a portion of landowners, whose land has significant environmental features, who will not respond to voluntary mechanisms unless it is economically in their interests to do so.³⁷³ There are currently few economic or other incentives for encouraging landowners to protect areas of their land; in fact the costs of protection can be a significant deterrent.³⁷⁴ For example in a survey of landowners conducted in the Rodney Region, 75 percent of landowners who had sought covenant protection cited incentives, such as development rights, as being a significant factor in motivating them to enter into covenant agreements.³⁷⁵ These examples demonstrate the need for improvements in the way New Zealand law manages conservation on private land.

The difficulty with developing a range of policies and instruments to achieve protection on private land is that there is often a conflict between the use of land for private or production purposes and conservation. Therefore in order to secure protection on private land a balance needs to be struck between the need to conserve biodiversity for New Zealand as a whole and the rights of landowners to be able to

³⁷⁰ Ibid, para 120.

³⁷¹ Cocklin, and Davis, *supra* n 280 at 14.

³⁷² Ibid, 28.

³⁷³ Gunningham and Young, *supra* n 284 at 261.

³⁷⁴ Meeting with Mairi Jay, Friends of Barrett Bush/ Tui 2000, 03/05/07.

³⁷⁵ Cocklin, and Doorman, *supra* n 301 at 276.

use their land as they please.³⁷⁶ It is also important that there be integration between the different organisations and agencies involved in conservation, particularly between local, regional, and central government policies,³⁷⁷ something which some of the examples from the interviews I conducted suggested may be lacking in some areas. At present there are a large number of different agencies responsible for different aspects of biodiversity conservation on private land with no one agency taking the lead.³⁷⁸ Whatever options the New Zealand government chooses to take it is important to remember that to gain optimal results for restoration projects it is necessary to use mechanisms that facilitate community involvement in restoration activities and in the development of the law that affects them.

There is a significant amount of literature written on the potential for improvements in the protection of New Zealand's native biodiversity.³⁷⁹ There is also much written on the approaches overseas jurisdictions have taken, or are proposing to take, to increase protection of significant natural areas.³⁸⁰ For example, in the United States, Canada, and Europe, a range of market-based incentives and other mechanisms have successfully been used to encourage private landowners to participate in conservation and prevent damage to areas whose protection is in the public interest.³⁸¹ Australian examples are also particularly relevant with many Australian states taking innovative approaches to conserving and protecting their indigenous biodiversity. Economic instruments have also been used in a number of states to increase the revenue the government has available to provide for conservation, through taxing negative activities, and increasing landowner buy in of conservation projects on their land by providing financial incentives.³⁸² Economic instruments are discussed in detail below. Some of the approaches used overseas could be suitably applied in New Zealand, and

³⁷⁶ Cocklin, and Davis, *supra* n 280 at 6.

³⁷⁷ C. Binning and M. Young, *Beyond Roads, Rates and Rubbish: Opportunities for Local Government to Conserve Native Vegetation* (1999) 19-20.

³⁷⁸ Ministry for the Environment, *supra* n 283 at 13.

³⁷⁹ See for example; C. Cocklin, and P. Davis, *Protecting Habitats on Private Land: Perspectives from Northland, New Zealand* (2001).

³⁸⁰ See for example; N. Gunningham and M. D. Young "Toward Optimal Environmental Policy: The Case of Biodiversity Conservation" (1997) 24 *Ecology Law Quarterly* 243.

³⁸¹ Cocklin, and Davis, *supra* n 280 at 10.

³⁸² Gunningham and Young, *supra* n 284 at 292.

may not only help CCGs to be better involved in the legal protection of restoration sites, but have the potential to increase the opportunities for CCGs to have input in policy decisions that affect their projects. In the proceeding sections I will discuss some of the possible changes that could be used to improve New Zealand policy on biodiversity conservation on private land, and will further this with an analysis of some of the approaches taken overseas.

(ii) Covenants

While covenants are useful tools for ensuring that significant natural areas are protected in the long term they do not ensure that the area will retain its ecological quality. Many ecosystems, particularly in highly modified urban or rural environments, as in the Waikato, require ongoing maintenance if they are to retain their biodiversity.³⁸³ To ensure the quality of a covenanted area many sites require ongoing pest plant and animal management, fencing to protect the area from stock, and planting or translocation to replace species that have already been lost.³⁸⁴ Binning and Feilman suggest that one way to ensure that projects on private land can be maintained in the long term is to require that there be some kind of fund or trust created as a requirement of registering a covenant, which will provide funding to ensure that the ongoing management of a covenanted area can be maintained, although if this was to be made a requirement of entering into a covenant then it may deter further covenants becoming registered due to the need to have significant funds for such a requirement to be met.³⁸⁵

Another option would be for the organisation responsible for registering the covenant, for example the QEII Trust, to fund the ongoing management of the covenanted area.³⁸⁶ The Trust for Nature in Victoria, Australia currently provides payments to landowners to cover management costs of covenanted areas, as well as compensation for loss of income on productive land. These management payments have helped to

³⁸³ Binning and Feilman, *supra* n 19 at 4.

³⁸⁴ Australian Government, *Gifts that Keep on Giving: A Landholders Guide to Land Protection and Conservation Options* (Undated) 10.

³⁸⁵ Binning and Feilman, *supra* n 19 at 8.

³⁸⁶ Australian Government, *supra* n 384 at 11.

ensure the success of Trust for Natures covenanting program.³⁸⁷ However at present a scheme like this is not possible for QEII as they are already extended to their limits of funding and it would not be possible for them to provide further funds to landowners without additional funding being provided to the QEII Trust by the government.³⁸⁸ Evidence of the potential effectiveness of increasing funding for legal protection can be seen in the increased numbers of landowners seeking protection since funding for agencies, such as the QEII Trust, was increased in 2000. Since its funding was increased the trust has been able to respond to the requests of more landowners and therefore has increased the amount of land under protection.³⁸⁹ However as explained above there are still many landowners that the QEII cannot help because of their limited funding. Binning and Young suggest that rather than providing the funding to landowners to conduct the ongoing management of ecosystems on private land it may be an option for covenanting groups like QEII to enter into arrangements with CCGs so that a CCG can be allocated an area of bush to maintain as an alternative to landowner management.³⁹⁰ This may help to spread limited funds further due to the fact that members of CCGs will often provide assistance for such activities on a voluntary basis.

In parts of Canada conservation covenants are also used to ensure long term protection.³⁹¹ Under s 3 of the Ontario Conservation Land Act 1990 landowners may enter into a conservation covenant with a “conservation body” for the purpose of conserving, maintaining, restoring, or enhancing “all or a portion of the land or the wildlife on the land”.³⁹² Non-profit groups, such as CCGs, that are registered charities qualify as conservation bodies under s 3(1) of the Act. There are three key ways that the Act helps to overcome common law barriers to covenants.³⁹³ Firstly, under s 3(4) of the Act a conservation covenant will be valid even if the CCG does not own land

³⁸⁷ Clough, *supra* n 319 at 7.

³⁸⁸ *Ibid*, 5.

³⁸⁹ W. Green and B. Clarkson, *Turning the Tide?: A Review of the First Five Years of the New Zealand Biodiversity Strategy* (2005) 16.

³⁹⁰ Australian Government, *supra* n 384 at 11.

³⁹¹ M. Campbell, “Tools for the Protection of Ecologically Significant Private Lands in Ontario: A Case Study of Marcy’s Woods” (2006) 17 JELP 47, 51.

³⁹² Conservation Land Act R.S.O. 1990, s 3(2).

³⁹³ Campbell, *supra* n 391 at 52.

appurtenant to the covenanted land and “regardless of whether the easement or covenant is positive or negative in nature”.³⁹⁴ Secondly, under s 3(5) the covenant will run with the land therefore is binding on successors in title. Finally, under s 3(6) the CCG is able to take action to enforce the covenant against the landowner and any successors in title. Providing that a CCG effectively monitors and enforces the covenant this form of protection can be significant in maintaining protection on private land.³⁹⁵ To date Canadian landowners have successfully implemented conservation covenants under this Act to protect land from subdivision and to prevent drainage of wetlands, construction of new dwellings and water takings.³⁹⁶

One other potential downfall of conservation covenants is the possibility that they may be terminated by the courts at a later date when a landowner has either changed their mind about wanting a conservation covenant to restrict their land use rights or a new landowner who has purchased the land wants to use the land in a different way and their plans are hindered by the presence of the covenant. At common law the burden of the covenant did not run with the land and therefore could not bind successors in title.³⁹⁷ Statutes such as the QEII Trust Act, that have been brought into force to allow conservation covenants, modify the common law and therefore allow the burden of a conservation covenant to run with the land. However other forms of covenant protection that are not provided for by statute, under the Reserves Act or QEII Trust Act, are not secure as they can be challenged in accordance with the common law.³⁹⁸ Easements such as those used in the United States for conservation purposes are generally harder to challenge and therefore may provide protection on a more permanent basis.³⁹⁹ This form of easement is discussed in detail below and would provide a useful alternative to conservation covenants for the protection of restoration sites in New Zealand.

³⁹⁴ Conservation Land Act R.S.O. 1990, s 3(4).

³⁹⁵ Campbell, *supra* n 391 at 52.

³⁹⁶ Environment Canada, *Conservation Easements as Ecological Gifts* (2007) 2-4

³⁹⁷ Hinde, McMorland, Campbell, and Grinlinton, *supra* n 281 at 732.

³⁹⁸ Meeting with Raewyn Peart, Environmental Defence Society, 18/09/07.

³⁹⁹ R. H. Platt, *Land Use and Society: Geography, Law, and Public Policy* (1996) 106.

(iii) Management Agreements

One way that significant natural areas on private land have been successfully managed in New Zealand and overseas has been through management agreements. A management agreement is usually an agreement between a government agency and a landowner, although there appears to be no reason in practice why a management agreement for conservation purposes could not be entered into between the landowner and a CCG.⁴⁰⁰ Despite provision for them in the Reserves Act and Conservation Act it appears that management agreements are rarely used in New Zealand, and there is little discussion about them in the literature on conservation on private land. There has been some reluctance by New Zealand landowners to enter into management agreements as they are concerned about the increased level of interference by government departments in the management of their land.⁴⁰¹ To reduce these types of concerns it may be more appropriate for government to delegate some level of authority for negotiating agreements to CCGs because of the generally better relationship between CCGs and landowners.⁴⁰²

One of the significant advantages of management agreements is that they can be negotiated to fit a particular site and any special circumstances that are unique to that site and help to ensure the long term maintenance of a project.⁴⁰³ They can also be negotiated to take into account the current land uses of the land and the needs of the landowner.⁴⁰⁴ If management agreements are to be successful it is important that the negotiated agreement clearly sets out the rights and obligations of each of the parties to the agreement, in particular it should be clear who is responsible for the ongoing maintenance of the site, for example, the landowner, a CCG or an organisation like QEII Trust.⁴⁰⁵

⁴⁰⁰ C. E. Binning and M. D. Young, *Motivating People: Using Management Agreements to Conserve Remnant Vegetation* (1997) 1.

⁴⁰¹ C. Saunders, *Covenants as a Policy Mechanism for Providing Conservation of Natural Features: Survey of QEII Covenants in Canterbury: Department of Economics and Marketing Discussion Paper No. 13* (1995) 8.

⁴⁰² Binning and Young, *supra* n 400 at 55.

⁴⁰³ *Ibid*, 1.

⁴⁰⁴ *Ibid*, 32-33.

⁴⁰⁵ *Ibid*, 40.

One example of a form of management agreement that has been used successfully in New Zealand is the Waiau Fisheries and Wildlife Habitat Enhancement Trusts Habitat Enhancement Agreement. These agreements are entered into between a private landowner and the trust for the retirement of pieces of private land that the trust considers important to the enhancement of the Waiau river catchment.⁴⁰⁶ The term of the agreements are 20 years and during this time the landowner is required to fence off the land subject to the agreement, to maintain the fences and to keep stock out of the fenced areas. In return the trust provides the landowner with financial remuneration. This payment is conditional on the landowner complying with the agreement and in the event that the landowner fails to meet the conditions of the agreement the trust can demand that the money be returned.⁴⁰⁷ According to Mark Sutton who works for the trust these agreements have been very successful and have resulted in the retirement of a large amount of private land.⁴⁰⁸ This model is a useful example for CCGs as it provides a method that CCGs can use themselves to help increase protection of private land and although the protection is limited to only 20 years there is potential for this to be extended at the end of the term or for further protection to be sought at a later date.

An example of where management agreements between government and private landowners have been successfully implemented in Australia is the Victoria's Land for Wildlife Scheme. Land for Wildlife is a scheme implemented by the Victorian state government to encourage landowners to enter into voluntary agreements. These agreements allow land to be managed for the purposes of conservation while providing the landowner with the option of continuing the current land use on the property.⁴⁰⁹ Land for Wildlife provides landowners with information about how they can manage their land in ways that will sustain any elements of native biodiversity

⁴⁰⁶ Waiau Fisheries and Wildlife Habitat Enhancement Trust, *Habitat Enhancement Agreement* (2007) 1.

⁴⁰⁷ Ibid, 2.

⁴⁰⁸ M. Sutton, *Presentation to the National Wetlands Trust AGM*, 27 August 2007.

⁴⁰⁹ Department of Sustainability and Environment, *General Information about Land for Wildlife* available at <www.dse.vic.gov.au> (last accessed 24/07/07).

which are present there,⁴¹⁰ and often are run with collaboration between government, CCGs, and the landowners.⁴¹¹ While these agreements appear useful in principle they are non-binding therefore they provide no long term security of protection as a landowner may withdraw their property from the scheme at any time.⁴¹² Another disadvantage of these agreements is that it can be costly and highly labour intensive to negotiate each individual agreement on a case by case basis.⁴¹³ However, the positive aspects of this scheme are that its voluntary and non-binding nature has been found to be attractive to Victorian communities and it has been well received.⁴¹⁴ Therefore these agreements can be used as a stepping stone to further conservation work and towards implementing binding and long term protection in the future as landowners adapt to the increased level of public input into the management of their land.⁴¹⁵ Some elements of these agreements, such as those in respect to CCGs, could potentially be adopted into s 76 of the Conservation Act in order to increase the effectiveness of protected private land agreements. However one of the limitations of management agreements is that because they are not in perpetuity they must be renegotiated over time, either when the agreed term ends, or the land ownership changes. This means that there can be a lack of certainty about how long protection will last and a lack of continuity in the terms of the agreement in the event that the landowner wants to change the agreement upon renegotiation.⁴¹⁶

(iv) Regulation

Governments have the authority to use their power to alter the behaviour of people within their state. There are two different forms of authority that may be exercised by government. The first being imperium, “the deployment of force” and secondly, through dominium, “the deployment of wealth”.⁴¹⁷ Environmental regulation in its varying forms is one of the key ways that policy makers exercise their authority to

⁴¹⁰ Stoneham, Crowe, Platt, Chaudhri, Soligo, and Strappazon, supra n 18 at 27.

⁴¹¹ E. Phillips, *Conservation on Private Lands: Australian Local Government Initiatives* (2006) 9.

⁴¹² Binning and Young, supra n 400 at 10.

⁴¹³ Ibid, 33.

⁴¹⁴ Stoneham, Crowe, Platt, Chaudhri, Soligo, and Strappazon, supra n 18 at 27.

⁴¹⁵ Binning and Young, supra n 400 at 33.

⁴¹⁶ N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (1998) 59.

⁴¹⁷ T. C. Daintith, “Legal Analysis of Economic Policy” (1982) 9 *Journal of Law and Society* 191, 215.

help facilitate increased protection of biodiversity.⁴¹⁸ Regulation can be used to alter the relative costs of biodiversity conservation so that policies are favourable to biodiversity protection rather than destruction or development:⁴¹⁹

Ways of increasing costs include taxes, and regulatory instruments like quotas, standards and simple prohibitions, whose breach carries the threat of fines and physical and other punishments. These instruments all fall within the category of *imperium*, in so far as they invoke, directly or at one or more removes, the resources of force that are at the disposition of government. Conversely, the main cost-reducing instrument...the consumer or manufacturer subsidy is an example of *dominium*.

Ayres and Braithwaite argue that for regulation to be effective it needs to be responsive to the motivations of the regulated parties so that the best results can be achieved.⁴²⁰ They argue that what is needed when creating regulations is “optimum stringency rather than maximum stringency”⁴²¹ and therefore voluntary mechanisms may, in the right circumstances, effectively deal with an issue.⁴²² Many of the mechanisms currently used, and some of those I have discussed above require the voluntary action of landowners. Voluntary mechanisms are a form of regulation in that they involve the creation of rules about how a landowner can use their land that are brought into being by the landowner.⁴²³ However voluntary approaches alone are not enough and will not encourage landowners who are adverse to conservation to protect significant areas on their land,⁴²⁴ and where urgent action is needed⁴²⁵ or certainty is required regulation may be the most appropriate option.⁴²⁶ It is a dependable mechanism which, if monitored and enforced effectively, can ensure minimum standards are met.⁴²⁷ Regulation has been defined by Julia Black as being:⁴²⁸

⁴¹⁸ Gunningham and Grabosky, supra n 416 at 4.

⁴¹⁹ Daintith, supra n 417 at 217.

⁴²⁰ I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 4.

⁴²¹ Ibid, 52.

⁴²² Ibid, 38.

⁴²³ T. Daintith, “Regulation” in R. Bauxbaum and F. Madl (Chief eds.), *State and Economy (Volume XVII)* (1997) 20.

⁴²⁴ Binning and Young, supra n 400 at 31.

⁴²⁵ Gunningham and Young, supra n 284 at 272.

⁴²⁶ Stoneham, Crowe, Platt, Chaudhri, Soligo, and Strappazon, supra n 18 at 27.

⁴²⁷ Gunningham and Grabosky, supra n 416 at 41.

⁴²⁸ J. Black, “Critical Reflections on Regulation” (2002) 27 Australian Journal of Legal Philosophy 1, 26.

[T]he sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms or standard-setting, information gathering and behaviour-modification.

To further protection of restoration projects it is necessary for there to be a strong regulatory framework in place which acts as a backstop to protect areas on private land that are important to the protection of biodiversity and cannot be protected by other means.⁴²⁹ It is also important that the public is adequately informed about the regulations otherwise there is unlikely to be a high level of compliance.⁴³⁰ In the past much reliance has been placed on allowing market forces to regulate environmental matters; however it cannot be assumed that in all situations market based incentives can be relied upon to alter landowner behaviour.⁴³¹ In some situations even economic incentives will not be enough to encourage some landowners to comply with regulatory requirements.⁴³² For example, the rate relief offered by many councils under the provisions of the Local Government (Rating) Act are not adequate enough to make a substantial impact on the amount of rates that landowners pay on their land.⁴³³

Regulatory mechanisms, backed up by adequate penalties, have the potential to change behaviour of landowners who cannot be encouraged by other means.⁴³⁴ For example, restrictions may be placed on removal of native vegetation and supported by fines to discourage breaches of the regulation and to penalise those who do break the rules. This type of action is justified because the irreversible nature of biodiversity loss makes it necessary to protect biodiversity on private land for the good of all New Zealanders and ensure that it is not exploited by property owners at the expense of the public. However the fact that regulation affects the ways in which landowners are able to manage their land has led to debate as to what extent regulation can be used to

⁴²⁹ Binning and Young, *supra* n 400 at 32.

⁴³⁰ S. C. Winter and P. J. May, "Motivation for Compliance with Environmental Regulations" (2001) 20 *Journal of Policy Analysis and Management* 675, 679.

⁴³¹ B. Barton, "The Legitimacy of Regulation" [2003] 20 *NZULR* 364, 386.

⁴³² Farrier, *supra* n 273 at 390.

⁴³³ Clough, *supra* n 319 at 5.

⁴³⁴ Gunningham and Young, *supra* n 284 at 271-272.

modify landowner behaviour towards conserving biodiversity and who should bear the cost.⁴³⁵

Property rights advocates argue that to regulate land so that a landowner is not able to use it in the manner in which he or she intended constitutes a ‘taking’ of land which, although it does not involve physically taking the land away, justifies compensation for the loss of the right to use the land as planned.⁴³⁶ The ‘takings issue’ poses the question “to what extent can regulations reduce the value of private property without compensation to the owner?”⁴³⁷ This issue has been hotly debated in the United States where the Fifth Amendment to the Bill of Rights restrains the ability of the state to ‘take’ landowners rights without compensation.⁴³⁸ However in New Zealand, unlike in the United States, merely restricting the rights of a landowner to use their land in a particular way does not justify compensation.⁴³⁹ Section 85(1) of the RMA directly addresses the takings issue:

An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act

This is qualified, however, by sections 85(2), 85(3) and 85(4). Under s 85(2) a landowner who believes that a “provision or proposed provision” in a plan would render an “interest in land incapable of reasonable use” can either make a submission against the plan or make an application for a plan change in accordance with schedule 1, clause 21 of the RMA.⁴⁴⁰ This provides landowners with a way of raising their concerns and challenging any provisions they deem to be unduly restrictive. Sections 85(3) and 85(4) allow the Environment Court to initiate a plan change in the event that a provision in a plan renders land “incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land”,

⁴³⁵ B. Barton, *supra* n 431 at 364; P. A. Joseph, “The Environment, Property Rights and Public Choice Theory” (2003) 20 NZULR 408.

⁴³⁶ K. Ryan, “Should the RMA Include a Takings Regime?” (1998) 2 NZJEL 63, 65.

⁴³⁷ Platt, *supra* n 399 at 258.

⁴³⁸ The United States Department of State, *The Bill of Rights (Amendments 1-10 of the Constitution)* available at <<http://usinfo.state.gov>> (last accessed 05/10/07).

⁴³⁹ *Waitakere City Council v Estate Homes Ltd* [2007] 2 NZLR 149, 168.

⁴⁴⁰ Resource Management Act 1991, ss 85(2)(a) and 85(2)(b).

therefore providing an independent consideration of the issues if a landowner feels aggrieved with the council processes.⁴⁴¹

Determining how and to what extent interference with property rights justifies compensation is a difficult task. Landowners may lose rights through regulation but they can also gain benefits such as increased land value due to increased conservation value. Owen McShane argues that the RMA should be amended so that the extent to which councils can 'take' property rights through regulation is made clear.⁴⁴² However in some cases landowners will suffer economic detriment for the benefit of the public.⁴⁴³ William K Jaeger of Oregon State University argues that it is a common misconception that property values will always decrease as a result of environmental regulation.⁴⁴⁴ He argues that there are two main situations where land values may increase. Firstly, through amenity effects and secondly, through scarcity effects. An amenity affect occurs "when land-use regulations protect, enhance, or create amenities or services that benefit property owners" for example, through benefits that are provided to the community as a whole. Scarcity effects occur where the scarcity of land with conservation features increases its economic value.⁴⁴⁵

Philip Joseph argues that, because New Zealand law does not provide compensation for regulatory takings, regulation that limits the extent to which a landowner is able to use his or her land in the way that he or she intended justifies the payment of compensation to offset the loss of property rights otherwise landowners unjustly bear the costs of environmental protection.⁴⁴⁶ Barton argues however that property rights should not be assumed to be protected above other aspects of the law and that there is a need for property rights to be balanced with environmental regulation in order to

⁴⁴¹ Ibid, s 85(3).

⁴⁴² O. McShane, *Land Use Control Under the Resource Management Act: A "Think Piece"* (Ministry for the Environment: Wellington, 1998) 31.

⁴⁴³ A. Memon and P. Skelton, "The Practice of Environmental Compensation Under the Resource Management Act 1991" (2004) 8 NZJEL 177, 183.

⁴⁴⁴ W. K. Jaeger, "The Effects of Land-Use Regulations on Property Values" (2006) 36 Environmental Law 105, 106.

⁴⁴⁵ Ibid.

⁴⁴⁶ Joseph, *supra* n 437 at 409-410.

“advance the overall good”.⁴⁴⁷ In *Falkner v Gisborne District Council* the High Court found that “The [Resource Management] Act is simply not about vindication of personal property rights, but about sustainable management of resources”.⁴⁴⁸ This also infers that, in terms of the RMA, protection of the environment is not to be secondary to the rights of private landowners and that regulation of private property is justified if it helps to ensure the sustainability of New Zealand’s environment. In respect to restoration, protection on private land can play a significant role in ensuring sustainability of biodiversity resources, particularly in areas surrounding towns and cities where few fragments of native bush remain.⁴⁴⁹ Kathleen Ryan argues that the “key question” in respect to the taking of property rights through environmental regulation is “to what extent society should impose disproportionate burdens on particular members”.⁴⁵⁰ Recently there has been a trend of considering important environmental features on private land in terms of “common property” that should be protected for the benefit of both present and future generations. Therefore private property rights are not necessarily absolute. However, where public rights interfere with private rights there is often a presumption that some form of compensation will be payable.⁴⁵¹

The literature that I have studied on this topic covers a diverse range of views about how to balance the rights of individual property owners with the need for environmental regulation. Finding the balance between ownership rights and the public good is a difficult task. However it is necessary that in the interests of biodiversity landowners make a reasonable contribution to protecting the environment. While it is not entirely fair that landowners should find themselves unduly burdened by the requirements of the RMA it is also inequitable for individual landowners to freely exploit New Zealand’s biodiversity without reasonable restraint.

⁴⁴⁷ Barton, *supra* n 431 at 391.

⁴⁴⁸ *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 632.

⁴⁴⁹ Farrier, *supra* n 273 at 317-320.

⁴⁵⁰ Ryan, *supra* n 438 at 89.

⁴⁵¹ Kabii and Horwitz, *supra* n 290 at 16.

Regulation is not the best method in all situations, and if the regulatory measures used are too harsh then it may work against CCGs by decreasing the enthusiasm of landowners towards conservation.⁴⁵² It has been suggested that in some situations an “engage not enrage” approach should be taken to regulation and that it may be more appropriate to use tools that facilitate landowner participation than to force landowners into reluctant compliance with regulation.⁴⁵³ In a 2004 report for the QEII Trust Maggie Bayfield cautions against the use of a “strong regulatory approach” because of the likelihood of a negative reaction from landowners, citing as an example the negative reaction of landowners to a strong approach in the Far North District Councils draft district plan.⁴⁵⁴ In that instance DoC had been undertaking a process of identifying “special natural areas” (SNAs) and encouraging councils to regulate to protect these areas. Far North District Council embraced DoC’s advice and chose to develop regulations in its proposed district plan to ensure that the SNAs were protected.⁴⁵⁵ Guy Salmon argues that there were four key factors that caused the demise of the Far North District Councils proposed plan. Firstly, the areas of SNAs would have restricted the economic use of a large portion of land in the district; Secondly, the protected areas were in some cases more than half of a particular property; Thirdly, the SNAs were developed without consultation with landowners; and fourthly, the SNAs were not an entirely accurate record of the locations of important natural areas with some boundaries being inaccurately defined by the plans. These issues led to the proposed plan being withdrawn.⁴⁵⁶ Strict regulatory policies are also costly, in the sense that they require significant resources to be applied to enforcement and monitoring to ensure that people are complying with the law and it may be more productive to use incentives based measures to encourage farmers to participate in habitat protection.⁴⁵⁷

⁴⁵² Gunningham and Young, *supra* n 284 at 246.

⁴⁵³ Voigt, *supra* n 302 at 199.

⁴⁵⁴ Bayfield, *supra* n 315 at 20.

⁴⁵⁵ G. Salmon, “RMA Debacle in Far North: What Future for Nature Conservation on Private Land?” (June 1998) *Maruia Pacific* 7, 7-8.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ J. Boyd, K. Caballero, and R. D. Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions: Discussion Paper 99-32* (1999) 2.

Gunningham and Young suggest that to prevent negative reactions from landowners and to encourage them to improve bush rather than purely to retain it, it may be helpful to use economic incentives parallel to a regulatory scheme.⁴⁵⁸ Gunningham and Sinclair argue that rather than using long term compensation payments it may be more appropriate to use “circuit breakers” to help encourage compliance with regulation during the early phases of implementation. Circuit breakers are short term measures that help to make stronger regulation policies more palatable until the public becomes more accepting of the policy. Once the policy becomes more widely supported the circuit breaker is withdrawn.⁴⁵⁹ Such a scheme has been successfully implemented in South Australia to encourage acceptance of a ban on land clearance.⁴⁶⁰ Use of this type of economic instrument to ease landowners into accepting regulatory mechanisms is also commonly used in Europe.⁴⁶¹

In the United States two different mechanisms have been introduced by the Fish and Wildlife Service to help balance property rights with regulation and encourage increased landowner acceptance of regulation. These are “safe-harbour agreements” and “habitat banking”. Safe harbour agreements allow landowners to continue existing activities therefore provide landowners with some form of security that they will be able to use their land effectively. This helps to encourage landowners to enter into agreements on their land.⁴⁶² United States habitat banking is similar to that used in Australia and creates credits that can offset development permits.⁴⁶³ Regulation without at least limited forms of compensation to encourage landowners to protect areas of native vegetation on their land may be inefficient and are likely to result in high costs to enforce.⁴⁶⁴ This does not mean that incentives should be offered in all situations that can be classified as a taking.⁴⁶⁵ However there will be circumstances

⁴⁵⁸ Gunningham and Young, *supra* n 284 at 293.

⁴⁵⁹ Gunningham and Sinclair, *supra* n 285 at 874.

⁴⁶⁰ *Ibid.*

⁴⁶¹ Salmon, *supra* n 457 at 9.

⁴⁶² R. B. McKinstry Jr, J. McElfish, M. Jacobson, and D. J. Hay, “Legal Tools that Provide Direct Protection for Elements of Biodiversity” (2007) 16 *Widener Law Journal* 909, 921.

⁴⁶³ *Ibid.*, 922.

⁴⁶⁴ Ryan, *supra* n 438 at 65.

⁴⁶⁵ Barton, *supra* n 431 at 400.

where compensation will be appropriate, for example, to reimburse landowners for increased management costs.⁴⁶⁶

As discussed in detail above, one regulatory mechanism provided for under sections 108 and 220 of the RMA is to require areas in a development to be set aside for conservation purposes as conditions of subdivision consent.⁴⁶⁷ Resource consents must also be applied for before landowners are able to remove large areas of bush from their land.⁴⁶⁸ From the perspective of CCGs regulatory measures like these are beneficial as they have the opportunity to make submissions, either on district or regional plans while the plans are progressing through the plan change process, or otherwise to make submissions on proposed developments.⁴⁶⁹

Conclusions

While New Zealand's regulatory framework has made some inroads into protecting biodiversity on private land there is much more that can be done. Overseas experiences show that regulation, if applied correctly, can be one of the most effective means of protecting private land and balancing the interests of the public with the ownership rights of private landowners. New Zealand's regulatory framework could be greatly improved by adopting at least some of the examples from Australia and the United States that I have discussed above, particularly where landowners are not negotiable to change by other means.

(v) Economic Instruments

In literature I reviewed and in the interviews that I conducted, one of the main deterrents for private landowners in becoming involved in conservation work is the cost. The cost is a deterrent not only in the sense that many landowners do not have the financial resources to invest money in conservation, but also because there is a perception by some that conservation work is a public good and therefore should be

⁴⁶⁶ Farrier, *supra* n 273 at 309.

⁴⁶⁷ Booth, and Bellingham, *supra* n 339 at 440.

⁴⁶⁸ Environment Waikato, *supra* n 276.

⁴⁶⁹ Cocklin, and Davis, *supra* n 280 at 13.

paid for with public money.⁴⁷⁰ Economic instruments are an alternative form of regulation that can be used to encourage environmental objectives.⁴⁷¹ By providing economic incentives the government is exercising its power of *dominium*.⁴⁷²

Through economic policies government has the power to distort the market and manipulate landowner behaviour in a way that is favourable to the environmental policies that they wish to pursue.⁴⁷³ Economic instruments that reduce the costs to the landowner are measures that may help to encourage landowner participation and increase the effectiveness of community conservation projects, particularly if the costs of management are to be ongoing.⁴⁷⁴ These measures allow the costs to be shared between landowners, government, and the community and can therefore have the effect of making landowners more accepting of conservation activities on their land.⁴⁷⁵

Gunningham and Grabosky suggest that by providing adequate economic incentives governments can help landowners to see the value of biodiversity conservation. They argue that once protection has an economic value landowners are more likely to protect the land as it has an economic value to them personally.⁴⁷⁶ Incentives are also likely to make landowners more receptive to managing their land for the purpose of conservation as they are not having the rights to use their land restricted without any recompense. This may help to overcome the arguments surrounding undue restraint on individuals' property rights.⁴⁷⁷ Incentives can also be used to target properties or localities of high conservation value.⁴⁷⁸ One way that economic incentives could be used to facilitate protection of valuable areas would be for there to be a program in

⁴⁷⁰ C. Binning and M. Young, *Conservation Hindered: The impact of Local Government Rates and State Land Taxes on the Conservation of Native Vegetation* (1999) 13.

⁴⁷¹ B. Barton, "The Theoretical Context of Regulation" in B. Barton, L. K. Barrera-Hernandez, A. R. Lucas, and A. Ronne, *Regulating Energy and Natural Resources* (2006) 21.

⁴⁷² Daintith, *supra* n 417 at 215.

⁴⁷³ *Ibid*, 203

⁴⁷⁴ Gunningham and Young, *supra* n 284 at 292.

⁴⁷⁵ Binning and Young, *supra* n 400 at 20.

⁴⁷⁶ Gunningham and Grabosky, *supra* n 416 at 70-71.

⁴⁷⁷ *Ibid*, 434.

⁴⁷⁸ Ministry for the Environment, *supra* n 283 at 65.

place for the funding of conservation of land along biodiversity corridors where species pass through to get to larger habitats.⁴⁷⁹ This targeted form of economic incentive could help to ensure that there is efficient use of limited funds.

However the balance needs to be struck, when determining what the value of economic compensation should be, between the duty of care owed by landowners as stewards of the land to protect significant features on the land, and providing equitable levels of compensation to balance out landowner rights with public benefits of conservation on private land. It is important in this respect the landowners are not being overcompensated for “fulfilling their landownership responsibilities”.⁴⁸⁰ This can make it difficult to determine what level of compensation is fair.⁴⁸¹

Whatever form economic instruments take it is essential that they are adequate to encourage participation by landowners in a productive manner, as inadequate incentives may not appease landowners and as stated by David Farrier, “Disgruntled landowners make poor conservationists”.⁴⁸² Farrier suggests that one possible way that payments schemes could be structured would be for them to be managed by a private body that is “locally based” such as Forest and Bird. This would help to reduce the negative perception that some landowners can have of schemes directly administered by government agencies.⁴⁸³ It is also a way to assist CCGs to encourage landowners to enter into agreements for the restoration and protection of native bush on their land.

Incentive Payments and Subsidies

Incentive payments are a means by which landowners can be encouraged to become involved in conservation.⁴⁸⁴ They can also provide a means for assisting landowners

⁴⁷⁹ Brown, *supra* n 11 at 244.

⁴⁸⁰ *Ibid*, 242.

⁴⁸¹ Kabii and Horwitz, *supra* n 290 at 15.

⁴⁸² Farrier, *supra* n 273 at 397.

⁴⁸³ *Ibid*, 405.

⁴⁸⁴ Binning and Young, *supra* n 400 at 44.

who are sympathetic to the need for conservation on their land.⁴⁸⁵ Payments could be made in the form of progress payments for goals achieved, for example, if a certain size area replanted.⁴⁸⁶ Binning and Young suggest that there are a number of different types of payments that could potentially be used to encourage landowners to do conservation work on their land. The first incentive suggested is compensatory payment for loss of land use rights. Binning and Young argue that this type of payment could be made to landowners to compensate them for the loss of income from turning potentially productive land into a conservation area in perpetuity. Secondly, they suggest that it may be appropriate in some circumstances to provide landowners with an upfront payment to cover future management costs such as fencing.⁴⁸⁷ Farrier also argues that forward looking payments such as these are appropriate ways of encouraging landowner stewardship.⁴⁸⁸ This type of payment could be a significant way of encouraging landowners to participate as ongoing management costs, particularly fencing costs, are one of the major points cited in the literature as to why farmers are often reluctant to enter into management agreements or covenants for conservation.⁴⁸⁹

Binning and Young also recommend that funding should be provided to cover at least a portion of the fencing costs of landowners who enter into agreements, they recommend that 100 percent of fencing costs should be paid for those who enter into in perpetuity agreements such as covenants.⁴⁹⁰ QEII has found that in their experience with private landowners, even small contributions towards the remaining fencing costs by local government authorities has increased the number of covenants registered in a region and the speed at which the process takes.⁴⁹¹

Subsidies are another form of economic incentive that can be used to encourage positive environmental activities by rewarding landowners who achieve set

⁴⁸⁵ Ministry for the Environment, *supra* n 283 at 65.

⁴⁸⁶ T. Denne, *Economic Instruments for the Environment* (2005) 3.

⁴⁸⁷ Binning and Young, *supra* n 400 at 44.

⁴⁸⁸ Farrier, *supra* n 273 at 400.

⁴⁸⁹ Bayfield, *supra* n 315 at 21.

⁴⁹⁰ Binning and Young, *supra* n 400 at 48.

⁴⁹¹ Bayfield, *supra* n 315 at 21.

environmental outcomes.⁴⁹² This form of incentive can be used to help achieve targeted conservation outcomes and can assist in overcoming the reluctance of landowners to participate in conservation works on their land.⁴⁹³ This could be helpful in increasing the success of community projects by increasing landowner participation. For example, Wayne Todd, Project Coordinator for Moehau Environment Group (MEG) has found that where there is increased landowner participation projects are far more likely to be successful. Wayne cited an example, a rat eradication project that MEG has been involved in at Port Charles in the Coromandel Peninsula. He said that in that specific project they group had the support of 100 percent of landowners in the community and as a result achieved a zero rat population in the area over an 18 month period.⁴⁹⁴ This example shows the potential for increased successes where there is greater participation of private landowners.

One of the advantages of these mechanisms is that they can often be more cost effective than regulation. The fact that landowners must meet specific standards in order to receive money encourages them to comply in order to gain the financial benefits, whereas in the case of regulation the responsible government department is likely to have to continually monitor and enforce the regulations at a considerable cost.⁴⁹⁵ This will not always be the case however, and in some situations there will be high monitoring costs to determine whether the landowner is meeting the conditions of the agreement.⁴⁹⁶ Another concern that has been expressed about these types of schemes is that it may lead to landowners, who would have done and paid for the work themselves, competing for funds with landowners who would not be involved in conservation work were it not for funding.⁴⁹⁷ There also is likely to be a high cost to maintain these types of schemes as they are reliant on local authorities being able

⁴⁹² Denne, *supra* n 488 at 3.

⁴⁹³ *Ibid.*

⁴⁹⁴ Meeting with Wayne Todd, Moehau Environment Group Incorporated, 02/05/07.

⁴⁹⁵ Gunningham and Grabosky, *supra* n 416 at 75.

⁴⁹⁶ *Ibid* 82.

⁴⁹⁷ Stoneham, Crowe, Platt, Chaudhri, Soligo, and Strappazon, *supra* n 18 at 27.

to come up with the funding to sustain them.⁴⁹⁸ One of the final reasons why subsidies may not be the best remedy is that they may give the impression that the landowner has a right to degrade biodiversity on their land if payment is not received.⁴⁹⁹

Tax Incentives and Rate Rebates

Taxes and rates have the potential to act as a disincentive for landowners considering conservation work.⁵⁰⁰ Under s 102(5)(a) of the Local Government Act 2002 a local authority is granted the ability to make a rates remission policy. This policy must meet two requirements (1) it must state “the objectives sought to be achieved by the remission” of rates (2) it must set out “the conditions and criteria to be met in order for rates to be remitted”.⁵⁰¹ Once this policy is in place the local authority has the option to choose to offer rates remissions to the properties that are owned, either entirely or in part, for conservation purposes.⁵⁰² It appears that in many instances local authorities are providing rate relief to land which has had a QEII covenant registered on the title in accordance with the provisions on the Local Government (Rating) Act.⁵⁰³ However, due to the low rateable value of much of the private land that qualifies for rate relief there is often little incentive effect provided through rate relief and it is unlikely to substantially motivate landowners to enter into conservation covenants or agreements. In some cases the value of the rate relief offered may not even cover the costs to the landowner of protecting the land, such as fencing costs.⁵⁰⁴

One of the issues with using a rate relief scheme is that it is often the areas where there are small rate paying populations, in rural areas, that have the highest need for biodiversity protection on private land. This means that if a rates rebate scheme was to be introduced it may take funds away from a council who already has low

⁴⁹⁸ Farrier, *supra* n 273 at 390.

⁴⁹⁹ B. Aretino, P. Holland, A. Matysek, and D. Peterson, *Cost Sharing for Biodiversity Conservation: A Conceptual Framework* (2001) 21.

⁵⁰⁰ Clough, *supra* n 319 at 7.

⁵⁰¹ Local Government Act 2002, ss 109(1)(a) and 109(1)(b)

⁵⁰² Local Government (Rating) Act 2002, s 85(1).

⁵⁰³ Bayfield, *supra* n 315 at 12.

⁵⁰⁴ Clough, *supra* n 319 at 5.

accessibility to funds through rates.⁵⁰⁵ While some councils, particularly those with smaller rate paying populations, may be reluctant to introduce a scheme that would see the amount of revenue they are able to generate decrease, it is likely that the overall decrease in revenue for councils of a rate rebate scheme for conservation areas would be small as generally the rebate would only be for the small parts of private properties that are actually covenanted rather than the entire property.⁵⁰⁶ It is also likely that the cost of providing rate relief to private landowners to facilitate their involvement in conservation work would be less than if the government was to manage and maintain such areas of land themselves.⁵⁰⁷ Binning and Young suggest that to counter the effect of lost rates on local councils it may either be necessary for rates for other rate payers in the district to be increased to spread the cost of conservation across all members of the community or otherwise for there to be an increase in funding of conservation at the local level from central government.⁵⁰⁸

One way that the tax law could be amended to allow costs of conservation works carried out on private land to be tax deductible. Binning and Young argue that by placing a conservation covenant on the title of their property a landowner is effectively ‘donating’ that area of land for the purposes of conservation therefore they should be able to claim tax relief for these “donations” in much the same way that tax can be claimed back for donations to other charities.⁵⁰⁹ Tax incentives can also help to motivate companies to participate in conservation activities.⁵¹⁰ In the United States tax relief offered to companies by the state has resulted in the protection of vast tracts of native forests owned by private companies. By offering tax relief to companies the United States government has been able to convince them not to clear and develop native forests but to sell them to the state for a reduced price. Because of the tax relief offered the company received similar profits on the sale of the land than what they

⁵⁰⁵ M. van Roon and S. Knight, *Ecological Context of Development: New Zealand Perspectives* (2004) 230.

⁵⁰⁶ Binning and Young, *supra* n 377 at 63.

⁵⁰⁷ Gunningham and Young, *supra* n 284 at 267 (see footnote 97).

⁵⁰⁸ Binning and Young, *supra* n 472 at 41.

⁵⁰⁹ C. Binning and M. Young, *Talking to the Taxman About Nature Conservation: Proposals for the Introduction of Tax Incentives for the Protection of High Conservation Value Native Vegetation* (1999) 34.

⁵¹⁰ W. J. Ginn, *Investing in Nature* (2005) 121.

would have gained if they had sold the land to a developer, and the region gained a significant piece of conservation land that is now protected in state ownership.⁵¹¹

Revolving Funds

One possible method for CCGs to use to secure long term protection of conservation areas on private land is with revolving funds. A revolving fund is a fund which allows an organisation to purchase property, place a covenant on the title to ensure that any significant areas are protected on the terms that the group specifies. The land is then resold with a covenant registered on the title.⁵¹² A fund of this kind has been successfully implemented by the Trust for Nature in Victoria, Australia. The Trust for Nature purchases land, covenants, and then resells, managing the land themselves in the interim period between purchase and resale.⁵¹³ The benefit of this type of scheme is that it allows conservation groups to buy land and ensure that any significant areas are protected on the terms, or management requirements, that suit the needs of the area as the covenant is entered into by the group and not an independent land owner.⁵¹⁴ This type of short term land purchase can also be beneficial as it allows for efficient use of limited funding as the group is not committing all of its funds to one specific land purchase but, as the name implies, once the land has been covenanted and resold the money from the sale goes back into the fund and can be used to purchase further properties.⁵¹⁵ In the case of the Trust for Nature, part of their funding is conditional on the land purchased under their revolving fund being resold with a covenant in place.⁵¹⁶ A further benefit of covenanting and selling through a revolving fund is that in many cases the person who eventually buys the covenanted land is often likely to be more conservation minded so it is likely that the management of the covenanted area on the land will be maintained once sold.⁵¹⁷

⁵¹¹ Ibid, 121-122.

⁵¹² Binning and Young, *supra* n 400 at 10.

⁵¹³ J. A. Fitzsimons, "Private Protected Areas? Assessing the Suitability for Incorporating Conservation Agreements Over Private Land into the National Reserve System: A Case Study of Victoria" (2006) 23 EPLJ 365, 372.

⁵¹⁴ Binning and Young, *supra* n 400 at 1.

⁵¹⁵ Fitzsimons, *supra* n 519 at 372.

⁵¹⁶ Ibid

⁵¹⁷ Binning and Young, *supra* n 400 at 10.

Another benefit of this approach is that it acts as a backstop method for protecting private land where landowners are unwilling to enter into a conservation covenant with the trust. Where the trust has identified a need for protection on a piece of private land and the landowner has declined to participate in the scheme the trust can wait for the property to be offered for sale and then purchase the property with the revolving fund.⁵¹⁸ However, a disadvantage of this approach is the time it may take for desired land to be available for purchase.⁵¹⁹ This may be beyond the timeframe possible for some CCGs and would be more appropriately managed by a larger organisation such as QEII Trust similar to how the Trust for Nature revolving fund operates in Victoria. One body which may be worthwhile considering to operate a revolving fund would be the New Zealand Native Forests Restoration Trust. The trust is one of New Zealand's longest standing restoration groups having been established in 1980 and its track record suggests that it would be an ideal candidate for running such a program.⁵²⁰

Gunningham and Grabosky also suggest that a revolving loan scheme that offers low interest loans to community groups could be an effective way of encouraging conservation work. Such a scheme could potentially benefit groups working on both public and private land. This type of scheme would operate by central government providing a loan fund that CCGs could apply to for money to be used in their projects. As the group fundraises and receives grants they are able to pay their loan back therefore the loan fund is recycled and can be used to assist other groups.⁵²¹

Competitive Bidding for Conservation: An example from Victoria, Australia

While the mechanisms mentioned above such as subsidies, tax relief and rates rebates are all ways of encouraging increased landowner participation in conservation work,

⁵¹⁸ Ibid, 32.

⁵¹⁹ Clough, supra n 319 at 7.

⁵²⁰ New Zealand Native Forests Restoration Trust, *Our History* available at <www.nznfrt.org.nz> (Last accessed 29/01/08).

⁵²¹ Gunningham and Grabosky, supra n 416 at 77-78.

they have often been criticised for their lack of economic efficiency.⁵²² It is not easy for governments to determine the true costs to landowners so to provide the appropriate level of compensation for decreases in property values or costs for maintaining conservation areas. Likewise it is difficult to determine how much tax or rate relief will act as an incentive to encourage biodiversity conservation and restoration.⁵²³ In Victoria, Australia, an innovative approach to funding conservation and maintaining biodiversity has been adopted called ‘Bush Tender’. Bush Tender aims to overcome the difficulties of valuing the cost of conservation work to private landowners by requesting for landowners to bid for conservation funds through a competitive auction process. The principle is that through the auction process the market is used to determine the minimum price that landowners will accept to do conservation work on their land.⁵²⁴ The competitive nature of the bidding process helps to drive down the price that the government is required to pay landowners therefore is thought to be more cost effective than the government estimating what could be the true cost.⁵²⁵

Under Bush Tender the lowest price bid will not necessarily be accepted but those bidding must submit a proposal of the work that they intend to undertake under contract with the Victorian Department of Sustainability and Environment which will be evaluated by the Department in terms of conservation gain for the amount of money spent. The bids are then compared and the contract will be awarded to the best value offer.⁵²⁶ Funding is provided to cover the costs of management as agreed between the landholder and the department in accordance with the landowners bid and is usually paid at a rate ranging between \$127-475AUD per hectare.⁵²⁷ The department regularly monitors properties to ensure landowners are complying with their agreements and reporting requirements mean that landowners must provide

⁵²² G. Stoneham, V. Chaudhri, A. Ha, and L. Strappazon, “Auctions for Conservation Contracts: An Empirical Examination of Victoria’s Bush Tender trial” (2003) 47 *The Australian Journal of Agricultural and Resource Economics* 477, 480.

⁵²³ Clough, *supra* n 319 at 20.

⁵²⁴ Stoneham, Chaudhri, Ha, and Strappazon, *supra* n 522 at 483.

⁵²⁵ Stoneham, Crowe, Platt, Chaudhri, Soligo, and Strappazon, *supra* n 18 at 16.

⁵²⁶ Fitzsimons, *supra* n 519 at 372.

⁵²⁷ P. Curnow and L. Fitz-Gerald, “Biobanking in New South Wales: Legal Issues in the Design and Implementation of a Biodiversity Offsets and Banking Scheme” (2006) 23 *EPLJ* 298, 302.

annual progress reports to the department.⁵²⁸ However as with other forms of incentive payments there is concern that landowners already undertaking conservation work at their own cost will bid for funds.⁵²⁹

(vi) Information Mechanisms

Information is one of the keys to ensuring successful restoration on both public and private land.⁵³⁰ Increasing public awareness about the issues of conserving indigenous biodiversity and the potential for protecting and restoring biodiversity can help to ensure the successful implementation of environmental policies as the community is likely to have a better understanding of why the changes are required.⁵³¹ Access to information about the law and the way that CCGs should manage the legal requirements was one of the major concerns cited by many of the groups that I interviewed.

Gunningham and Grabosky argue that information and education instruments are vital to successfully overcoming environmental issues. They argue that by providing education to individuals and groups involved in environmental work governments can help to overcome the barriers to successful management of natural resources.⁵³² Through provision of adequate information community awareness of the environmental issues at hand, and how the range of policy instruments work, can be increased. This can assist in improving the uptake of protection mechanisms and may help to reduce enforcement and monitoring costs by helping the community to understand the need for regulation and what is required of them under the law.⁵³³ Information measures can also be essential to ensuring the uptake of protection mechanisms by private landowners as landowners who have little awareness and understanding of the costs and benefits of a particular scheme are unlikely to be

⁵²⁸ Fitzsimons, *supra* n 519 at 375.

⁵²⁹ Stoneham, Crowe, Platt, Chaudhri, Soligo, and Strappazon, *supra* n 18 at 30.

⁵³⁰ Gunningham and Grabosky, *supra* n 416 at 60.

⁵³¹ S. Ercmann, "Enforcement of Environmental Law in United States and European Law" (1996) 26 *Environmental Law* 1213, 1219.

⁵³² Gunningham and Grabosky, *supra* n 416 at 60-61.

⁵³³ *Ibid*, 427-431.

interested in implementing such actions on their land.⁵³⁴ Because of their educational qualities information mechanisms are complimentary to all other forms of action that may possibly be taken. Therefore it is helpful if information is provided to the public in association with all of the other mechanisms I have discussed.⁵³⁵

(vii) Monitoring and Enforcement:

There will always be a number of landowners who will not comply, even with regulatory mechanisms, unless there is a serious risk of enforcement therefore an important factor in ensuring the success of mechanisms for protection of conservation areas on private land is to have a system in place for enforcing the covenant or agreement against the landowner, and for this system to be used in the event that there is a breach so that others who have such agreements in place know that there will be consequences in the event that they break the agreement or some of its terms.⁵³⁶ Enforcement can be defined as “any action or intervention taken to determine or respond to non-compliance”⁵³⁷ and includes:⁵³⁸

Monitoring, inspecting, reporting, gathering evidence to detect violations, and negotiating with individuals...to develop mutually acceptable methods for achieving compliance. As a last step to compel compliance, enforcement includes recourse to legal action or dispute settlement.

Without enforcement the regulatory mechanisms put in place can lose their “deterrent effect”.⁵³⁹ By enforcing breaches of the law the state shows that the mechanisms used have more credibility, therefore is likely to result in higher levels of compliance by others as they realise that if they breach the law or agreement action will be taken to enforce it against them. Where enforcement is low there is likely to be lower levels of compliance as people will not take the threat of enforcement seriously.⁵⁴⁰ Ensuring that those who have seriously breached the law have legal action taken against them

⁵³⁴ Kabii and Horwitz, *supra* n 290 at 13.

⁵³⁵ N. Gunningham and D. Sinclair, “Regulatory Pluralism: Designing Policy Mixes for Environmental Protection” (1999) 21 *Law and Policy* 49, 54-56.

⁵³⁶ Binning and Young, *supra* n 400 at 71.

⁵³⁷ L. F. Duncan, “Enforcement and Compliance” in E. L. Hughes, A. R. Lucas, and W. A. Tilleman, *Environmental Law and Policy (Second Edition)* (1998) 326.

⁵³⁸ Ercmann, *supra* n 531 at 1216.

⁵³⁹ Gunningham and Grabosky, *supra* n 416 at 45.

⁵⁴⁰ S. Ercmann, “Enforcement of Environmental Law in United States and European Law” (1996) 26 *Environmental Law* 1213, 1216.

is also an essential part of ensuring effective enforcement and maintaining credibility.⁵⁴¹ Binning and Young suggest that in some cases enforcement may mean that it is necessary to provide assistance to landowners who genuinely find the requirements of the agreement too onerous and in some cases may be necessary to renegotiate the terms of the agreement so that the obligations of the landowner are more manageable.⁵⁴²

Another key factor in ensuring a mechanism is successful is monitoring. This is important as monitoring helps to determine whether or not a project is meeting its objectives and whether any changes are required to the scheme to increase its effectiveness.⁵⁴³ Without good monitoring it is also not possible to determine whether or not the mechanisms that are being used are the most cost effective measures available for a particular project.⁵⁴⁴ It is essential to most of the above mentioned schemes that the agency responsible for their implementation undertakes ongoing monitoring to ensure that the proposed outcomes are being achieved and that the area is being managed in a way that will ensure it remains ecologically healthy.⁵⁴⁵ CCGs have a role to play in the monitoring process and because of their constant and direct involvement on sites and with landowners they can act as stakeholder watchdogs by reporting to the relevant organisation or government agency if landowners are not complying with their part of the bargain.⁵⁴⁶ If there is an element of an agreement or that which is shown by monitoring to be ineffective then it may be necessary for the terms to be renegotiated so that the objectives can be achieved, therefore it is necessary for there to be a certain degree of flexibility.⁵⁴⁷ In relation to the flexibility of management plans for covenanted land it has been suggested that it is better for a management agreement to be annexed to the covenant in a schedule rather than being registered on the title as part of the covenant document so that in the event that

⁵⁴¹ R. Martin, "Trends in Environmental Law and Prosecution" [2006] *Resource Management Theory and Practice* 172, 172.

⁵⁴² Binning and Young, *supra* n 400 at 71-72.

⁵⁴³ Department of Conservation, *supra* n 9 at 21.

⁵⁴⁴ T. Stephens, "Measuring Conservation Achievement" in Department of Conservation, *Biodiversity Now: Joint Societies Conference, Wellington, 29 June-3 July 1997. Selected Papers* (1999) 14.

⁵⁴⁵ Binning and Young, *supra* n 400 at 64.

⁵⁴⁶ Gunningham and Young, *supra* n 284 at 289-290.

⁵⁴⁷ Binning and Young, *supra* n 400 at 64.

monitoring shows that it is necessary to alter the management plan for the area it can be done relatively quickly and easily.⁵⁴⁸

Research by Ericksen et al has been critical of the monitoring provisions in Regional Policy Statements issued by Regional Councils under the RMA. They describe the policy statements as “lightweight” and lacking in “indicators for tracking the performance of the policies within them”.⁵⁴⁹ They were also concerned about the effectiveness of monitoring provisions in district plans and found that in general monitoring provisions were weak.⁵⁵⁰ Monitoring can also be expensive and time-consuming and this can discourage departments with limited funds from undertaking enforcement in an adequate manner.⁵⁵¹

(viii) Conservation Easements:

In the United States one of the most common mechanisms for protecting private land is the conservation easement, with over 1.4 million acres of land currently protected using conservation easements.⁵⁵² This form of easement operates in a similar fashion to most forms conservation covenants used in New Zealand in that they are voluntarily entered into and are binding on successors in title.⁵⁵³ The easement can be negotiated between a landowner and a CCG to meet the specific needs of the site and the landowner. The landowner maintains ownership of the land but agrees to certain limitations being placed on their use of the land.⁵⁵⁴ As will be discussed in detail below the approach taken to conservation easements in the United States is sui

⁵⁴⁸ A. P. Danne, “Voluntary Environmental Agreements in Australia: An Analysis of Statutory and Non-statutory Frameworks for the Implementation of Voluntary Environmental Agreements in Australia” (2003) EPLJ 287, 317.

⁵⁴⁹ N. J. Ericksen, P. R. Berke, J. L. Crawford, and J. E. Dixon, *Plan Making for Sustainability: The New Zealand Experience* (2004) 119.

⁵⁵⁰ *Ibid*, 139.

⁵⁵¹ D. A. Norton, “Monitoring Biodiversity in New Zealand’s Terrestrial Ecosystems” in Department of Conservation, *Biodiversity: Papers from a Seminar Series on Biodiversity, Hosted by Science and Research Division, Department of Conservation, Wellington, 14 June – 26 July 1994* (1996) 22.

⁵⁵² J. A. Gustanski, “Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands” in J. A. Gustanski and R. H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) 9.

⁵⁵³ Farrier, *supra* n 273 at 343.

⁵⁵⁴ A. E. Draper, “Conservation Easements: Now More Than Ever – Overcoming Obstacles to Protect Private Lands” (2004) 34 Environmental Law 247, 254-255.

generis and is very different to easements in the sense that they are applied in New Zealand. To help demonstrate the differences between the two forms of easements I will first introduce the way that easements operate in New Zealand and then move on to an evaluation of the conservation easements used in the United States.

Conservation Easements: An Introduction

At common law there are three main forms of easement; positive, negative and in gross. A positive easement provides the owner of the dominant tenement, that is, the land whose favour the easement is for, with a right to undertake certain activities on a neighbouring property known as the servient tenement.⁵⁵⁵ At common law the owner of the servient land was generally not required to take any action.⁵⁵⁶ However, under the section 294 of the Property Law Act 2007 an easement can be enforced against the owner of the servient land if they do not undertake any actions required by the easement.

Negative easements on the other hand require the owner of the servient land to refrain from certain activities and if the servient owner does not comply then the dominant owner has the right to enforce the easement against the servient owner.⁵⁵⁷ A conservation easement is a generally negative easement in the sense that it prevents the landowner from being able to use their land in a certain way.⁵⁵⁸ At common law there only a narrow range of negative easements were allowed. These included, “certain water rights, rights of support for buildings, and rights to light and air”.⁵⁵⁹ The third form of easement, an easement in gross, can be distinguished from the first two forms as does not have to attach to a separate piece of land but can attach to the land of the covenantor.⁵⁶⁰ Because a conservation easement has no dominant

⁵⁵⁵ For a more detailed examination of the law of easements see; G. W. Hinde, D. W. McMorland, N. R. Campbell, and D. P. Grinlinton, *Land Law in New Zealand (Volume 2)* (2004) 631.

⁵⁵⁶ *Jones v Prichard* [1908] 1 Ch. 630, 637.

⁵⁵⁷ Hinde, McMorland, Campbell, and Grinlinton, *supra* n 281 at 631.

⁵⁵⁸ T. D. Mayo, “A Holistic Examination of the Law of Conservation Easements” in J. A. Gustanski and R. H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) 31.

⁵⁵⁹ Hinde, McMorland, Campbell, and Grinlinton, *supra* n 281 at 631. Property Law Act 2007, s 294.

⁵⁶⁰ Property Law Act 2007, s 291.

tenement it is an easement in gross.⁵⁶¹ This means that it has a perpetual existence and is “not limited to the life of the grantee”.⁵⁶²

As New Zealand does not have a conservation easement statute like the United States Uniform Conservation Easement Act the Property Law Act 2007 and the common law continue to apply to easements entered into in New Zealand. If New Zealand CCGs were to use the current mechanisms to negotiate easements for conservation it is unlikely that they would be successful. Firstly, in New Zealand there is a very limited class of negative easements, such as the right to the support of buildings and the right to light and air.⁵⁶³ Because the class of negative easements available in New Zealand is so limited it is unlikely that conservation easements would be upheld in the courts. Secondly, because positive easements generally require no action on the part of the servient land owner it would be hard for a CCG to negotiate a successful conservation easement as in many cases landowners need to be involved in the management of a conservation easement.

Another reason that the current easement law in New Zealand would not provide adequate protection is because section 317 of the Property Law Act 2007 also allows easements (and covenants) to be extinguished by the courts if satisfied that:

- (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
 - (i) the nature or extent of the use being made of the benefited land, the burdened land, or both;
 - (ii) the character of the neighbourhood;
 - (iii) any other circumstance the court considers relevant; or
- (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
- (c) every person entitled who is of full age and capacity—
 - (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or
 - (ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or
- (d) the proposed modification or extinguishment will not substantially injure any person entitled.

⁵⁶¹ Draper, *supra* n 554 at 252.

⁵⁶² Hinde, McMorland, Campbell, and Grinlinton, *supra* n 281 at 614.

⁵⁶³ *Ibid*, 631.

This would make easements for conservation vulnerable to termination. Therefore if New Zealand CCGs are to obtain the benefits that conservation easements can potentially have it would be necessary for the New Zealand government to enact legislation similar to that of the United States.

Conservation Easements: The American approach to protection on private land

Conservation easements such as those used in the United States can be valuable mechanisms for protection because they help to overcome the common law barriers to easement use. The United States Uniform Conservation Easement Act 1981 (UCEA) specifically modifies the common law on easements to ensure that it cannot be used to weaken an easement in the same way that may occur with some forms of covenant in New Zealand. The UCEA provides:⁵⁶⁴

A conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is not privity of estate or of contract.

Once a conservation easement is in place it can be enforced against the owner of the land in the event that the owner decides to take action which is not in accordance with the easement agreement.⁵⁶⁵ Most easements are entered into in perpetuity which means that long term protection is usually guaranteed.⁵⁶⁶ Where easements are perpetual it also helps save money in the long term as is it generally not necessary for the easement to be renegotiated.⁵⁶⁷ This protection can often exist beyond the life of the CCG that entered into the agreement as it is possible for the easement to be passed on to another land trust in the event that the holder of the agreement is wound up.⁵⁶⁸

⁵⁶⁴ Uniform Conservation Easement Act 1982, § 4.

⁵⁶⁵ Boyd, Caballero, and Simpson, *supra* n 459 at 7; *Ephrata Area School District v County of Lancaster* 27/12/07, Cappy CJ, U.S. (S.C.) Pennsylvania J-153-2006.

⁵⁶⁶ Gustanski, *supra* n 552 at 16.

⁵⁶⁷ N. A. McLaughlin "Conservation Easements: Perpetuity and Beyond" (2007) 34 *Ecology Law Quarterly* 673, 675.

⁵⁶⁸ Brewer, *supra* n 172 at 161.

A conservation easement is a generally negative easement in the sense that it prevents the landowner from being able to use their land in a certain way.⁵⁶⁹ However, conservation easements are not restricted solely to negative easements and it is possible for easement terms to require that a landowner also takes positive actions, although it can be helpful for the conservation easement statute to state specifically that positive acts are enforceable. This restricts the possibility that the easement will be challenged in the courts.⁵⁷⁰

One of the significant advantages for CCGs of this method is that the group is able to directly negotiate the agreement with the landowner and has direct responsibility for ensuring the agreement is enforced. This means that a group does not need to rely on a third party to negotiate, monitor and enforce the agreement, and the terms of the agreement can be specifically negotiated to meet the needs of the landowner, the CCG, and the local community.⁵⁷¹ However the effectiveness of the easement is dependent on the CCGs ability to monitor and enforce the agreement.⁵⁷² It is also important that a good relationship is maintained between the landowner and the CCG responsible for enforcing the easement.⁵⁷³ CCGs can help educate landowners about easements and assist them through the process of donating or selling an easement on their land.⁵⁷⁴ It can also be easier for a group to obtain an easement over a property than for the group to buy a property themselves as then the group does not have to purchase the property outright and is not hindered by other ownership responsibilities.⁵⁷⁵ Having agreed to one easement in an area CCGs may find that their work has a flow on effect and that by raising the awareness of the availability of

⁵⁶⁹ Mayo, supra n 558 at 31.

⁵⁷⁰ Ibid, 31-34.

⁵⁷¹ Gustanski, supra n 552 at 22.

⁵⁷² Mayo, supra n 558 at 31.

⁵⁷³ J. B. Wright, "The Power of Conservation Easements: Protecting Agricultural Land in Montana" in J. A. Gustanski and R. H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) 397.

⁵⁷⁴ S. E. Richardson, "Applicability of South Carolina's Conservation Easement Legislation to Implementation of Landscape Conservation in the ACE Basin" in J. A. Gustanski and R. H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) 217.

⁵⁷⁵ D. G. Collins, "Enforcement Problems with Successor Grantors" in J. A. Gustanski and R. H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) 157.

such mechanisms other landowners may also choose to provide the CCG with an easement over their property.⁵⁷⁶

In the United States the key piece of legislation regarding conservation easements is the UCEA. This statute provided a model for each state to base its easement legislation on and helps to overcome the common law restrictions on the use of easements.⁵⁷⁷ The UCEA limits what kinds of organisation can hold a conservation easement to either:⁵⁷⁸

- (i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or
- (ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

All but one state in the United States have adopted an easement statute in varying forms.⁵⁷⁹ However not all states have adopted the UCEA in its original form and the different interpretations can affect the effectiveness of the conservation easement as a tool for biodiversity protection.⁵⁸⁰ Each states statute provides rules on who can be the holder of a conservation easement, but in most states the holder of the easement will either be a government body or a CCG.⁵⁸¹ Some states require that a CCG has been formed for a minimum of two years or more in order to ensure that the group is stable enough to be able to enforce a conservation easement.⁵⁸² The CCG negotiates the easement with the landowner and once the agreement is registered it is the responsibility of the group to enforce the agreement against the landowner if the terms of the agreement are breached.⁵⁸³

⁵⁷⁶ T. Daniels, "Saving Agricultural Land with Conservation Easements in Lancaster County, Pennsylvania" in J. A. Gustanski and R. H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) 181.

⁵⁷⁷ Gustanski, *supra* n 552 at 11.

⁵⁷⁸ Uniform Conservation Easement Act 1982, § 1(2).

⁵⁷⁹ J. O. Lippmann, "Exacted Conservation Easements: The Hard Case of Endangered Species Protection" (2004) 19 J. Env'tl Law and Litigation 293, 307.

⁵⁸⁰ Mayo, *supra* n 558 at 26.

⁵⁸¹ Lippmann, *supra* n 578 at 298.

⁵⁸² Mayo, *supra* n 558 at 39.

⁵⁸³ Gustanski, *supra* n 552 at 16.

Easements can be defined as “limited interests in real property held by individuals other than the principal owner, or by the general public”.⁵⁸⁴ Julie Gustanski defines conservation easements as “a legally binding agreement that permanently restricts the development and future use of the land to ensure protection of its conservation values”.⁵⁸⁵ The UCEA defines conservation easements as being:⁵⁸⁶

[A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

However the flexibility of easements means that to encourage landowners to protect their land the group can agree with the landowner for certain limited development rights such as the right to build an additional building on the site in a specified location at a later date. This can help to reassure the landowner that they will not lose the right to undertake all developments on their land.⁵⁸⁷

The easement document sets out the terms of the access arrangement between the parties. It is registered on the title of the property concerned and therefore will be binding on future owners. This helps to ensure access and/ or protection in the long term. The landowner retains legal ownership of the property, in much the same way as occurs with conservation covenants in New Zealand, but confers on a public agency or approved CCG the right to enforce restrictions upon the land as set out in the easement agreement. These often involve restricting development on the land to prevent adverse impacts on significant natural areas.⁵⁸⁸ In a traditional sense agreeing to an easement means that the landowner will provide a right of access onto their land to a third party whose entry to the property would otherwise be considered trespassing unless some other form of licence had been given by the landowner. In the case of a conservation easement access is not always provided, however the

⁵⁸⁴ Platt, supra n 399 at 104.

⁵⁸⁵ Gustanski, supra n 552 at 9.

⁵⁸⁶ Uniform Conservation Easement Act 1982, § 1(1).

⁵⁸⁷ Brewer, supra n 172 at 146.

⁵⁸⁸ Platt, supra n 399 at 104-105.

easement agreement will rather confer on the easement holder a right to enforce the conditions of the easement agreement against the landowner, for example, to prevent the landowner from cutting down trees in the area covered by the easement.⁵⁸⁹ Where possible it is helpful if easements are drafted in more general terms as terms that are too specific may make the easement easier to break by a future landowner and may raise the issue of enforcement for the CCG involved.⁵⁹⁰

As with other mechanisms the effectiveness of conservation easements is only certain if there is monitoring and enforcement to ensure that the terms of the agreement are being met.⁵⁹¹ It is important that CCGs are aware of the potentially high costs of enforcing easements in determining whether they have the capacity to take on an easement of a certain scale otherwise the purpose of entering into the agreement may not be fulfilled.⁵⁹² Where land changes ownership then it is possible that action may have to be taken to enforce the easement. This may lead to a group having to take or defend an action in the courts in order to have the terms of the agreement upheld.⁵⁹³ If an easement holder fails to enforce the rights that they have under the agreement then this may be considered abandonment and may allow the courts to terminate the easement at the request of a landowner.⁵⁹⁴ This highlights the importance of ensuring that a conservation easement is enforced. Adam Draper argues that in order to ensure that there is long term protection, even if the holder of the easement fails to enforce it, it is desirable for there to be a right of “third-party enforcement” so that another conservation organisation or public body can take an action to enforce the easement against the landowner if the CCG who negotiated the agreement does not have the capacity to defend it.⁵⁹⁵ One way that this could be done would be for a government authority to be given third party enforcement rights.⁵⁹⁶ This would be within the

⁵⁸⁹ Ibid.

⁵⁹⁰ Collins, *supra* n 575 at 164.

⁵⁹¹ J. Pidot, *Reinventing Conservation Easements: Critical Examination and Ideas for Reform* (2005) 18.

⁵⁹² Ibid, 6.

⁵⁹³ Ibid, 19.

⁵⁹⁴ Draper, *supra* n 554 at 266.

⁵⁹⁵ Ibid, 276.

⁵⁹⁶ Lippmann, *supra* n 579 at 353.

scope of the UCEA.⁵⁹⁷ However, as discussed above, without a statute such as those used in the United States conservation easements are often hard to enforce.⁵⁹⁸

It is up to a landowner to determine whether or not they want to enter into a conservation easement therefore it is likely that where there are incentives offered to encourage easements then there will be a higher uptake.⁵⁹⁹ In the United States landowners are provided with significant tax benefits for agreeing to a conservation easement. They can be used to help motivate reluctant landowners to become involved with CCGs or to assist those landowners who would not otherwise be able to afford protection on their land to seek the protection that they would like.⁶⁰⁰ Tax deductions are offered for the difference in value of private land before covenanting and the value afterwards. A tax rebate is available for the difference.⁶⁰¹ Unlike some overseas jurisdictions, like the United States, where landowners entering into open space covenants are afforded significant income tax reductions, New Zealand landowners are offered “no income tax advantages” to encourage them to enter into an agreement to covenant their property,⁶⁰² and as discussed above, little in the way of rate relief. The development of a tax relief scheme may be beneficial in encouraging increased conservation on private land in New Zealand. Such a scheme would be most effective in securing long term protection if the tax advantages were only to be offered to landowners who choose to protect the native bush on their land in perpetuity with a QEII covenant for example.⁶⁰³ However some landowners in the United States found that rather than their land values decreasing when surrounding properties entered into conservation easements property values actually increased.⁶⁰⁴ In some cases easements will be one of the methods that landowners wishing to

⁵⁹⁷ Uniform Conservation Easement Act 1982, § 3.

⁵⁹⁸ Collins, *supra* n 575 at 165.

⁵⁹⁹ Draper, *supra* n 554 at 250.

⁶⁰⁰ Boyd, Caballero, and Simpson, *supra* n 459 at 2.

⁶⁰¹ Kabii and Horwitz, *supra* n 290 at 14.

⁶⁰² Donahue, *supra* n 295 at 134.

⁶⁰³ Binning and Young, *supra* n 515 at 31-32.

⁶⁰⁴ T. Quinn, “A Farm and River Greenway on the St Croix River: Standing Cedars Community Land Conservancy and Wisconsin Farmland Conservancy” in J. A. Gustanski and R. H. Squires (eds.), *Protecting the Land: Conservation Easements Past, Present, and Future* (2000) 335.

develop their land can use as a way of mitigating the adverse effects of development. These kinds of easement are called exacted conservation easements.⁶⁰⁵

One of the advantages of conservation easements that has been cited in the literature is that they are an efficient way of conserving land as they do not require government agencies or CCGs to purchase a property in order to protect land but they are able to acquire an easement either by donation from the landowner or by purchasing an easement from the landowner.⁶⁰⁶ However there is debate as to whether conservation easements are an efficient means of protecting land when the high costs of enforcing and monitoring them can mean that over time the costs of protecting the land may have meant that it would cost little more to buy the land outright.⁶⁰⁷ In my opinion this will not be an issue in a large number of situations, and as with all mechanisms groups can use for protecting restoration sites, there will always be occasions when there is another method of protection that may be more suitable. Another concern regarding easements as long term methods of protection is that they can be terminated. They can also be modified “in accordance with the principles of law and equity”.⁶⁰⁸

Pidot argues that in order to overcome any issues with uncertainty regarding the termination and amendment of conservation easements it is important that the law is clear about when an easement can be terminated or amended. He argues that there must also be allowances made in the law so that in the event that the agreement needs to be changed to meet the changing needs of the group or the land it is clear what processes should be followed.⁶⁰⁹ In order to ensure that easements are harder to defeat Richard Brewer recommends that groups who use easements should take all efforts to ensure that the owners of the land who agree to the easement are well informed about how the easement work and that this is recorded preferably in a video tape form so

⁶⁰⁵ Lippmann, *supra* n 579 at 295.

⁶⁰⁶ *Ibid*, 314.

⁶⁰⁷ Pidot, *supra* n 591 at 32.

⁶⁰⁸ Mayo, *supra* n 558 at 45.

⁶⁰⁹ Pidot, *supra* n 591 at 25.

that there can be no doubt in the future that the landowners understood what they were agreeing to.⁶¹⁰

4. Protection on Public Land

New Zealand has one of the largest publicly owned conservation estates in the world, with about 30 percent of the country being protected in public ownership.⁶¹¹ The Department of Conservation alone is responsible for the administration of approximately 8.5 million hectares of publicly owned land,⁶¹² including 83 percent of New Zealand's indigenous forests.⁶¹³ According to the Auditor General's 2006 report on DoC administered land approximately 55 percent of that land is administered under the Conservation Act, 36 percent under the National Parks Act 1980, about 8 percent under the Reserves Act, and less than one percent under the Wildlife Act 1953.⁶¹⁴ In the Waikato region a large proportion of the land where restoration activities are likely to take place is on public land. Approximately 45 percent of native bush in the Waikato is protected for conservation purposes under the Conservation Act, National Parks Act, or Reserves Act.⁶¹⁵

One of the most significant ways that CCGs can contribute towards the conservation of biodiversity is to assist with the management of publicly owned land. It not only means that the group can pursue goals on public land that the Department cannot, or compliment activities that government departments already undertake, but that they can contribute to preserving biodiversity without having to find the money to purchase the land themselves. It is usually already protected by its public ownership.⁶¹⁶ However, in choosing to allow CCGs to undertake activities on public land DoC must be mindful of its obligations under the law, as well as considering

⁶¹⁰ Brewer, *supra* n 172 at 152.

⁶¹¹ Norton, *supra* n 551 at 1221.

⁶¹² Office of the Auditor General, *Department of Conservation: Planning for and Managing Publicly Owned Land* (2006) 11.

⁶¹³ V. Rive "Forests, Trees and Native Plants" in D. Nolan (ed.), *Environmental and Resource Management Law* (2005)

⁶¹⁴ Office of the Auditor General, *supra* n 612 at 17.

⁶¹⁵ Environment Waikato, *supra* n 23.

⁶¹⁶ The same point has been made in the U.S; R. Brewer, *Conservancy: The Land Trust Movement in America* (2003) 203.

what goals the Department has for a particular site and how these might differ from the goals of a CCG.⁶¹⁷

One of the main statutes relevant to the management of publicly owned land is the Conservation Act 1987. Section 6 of that Act sets out the functions of DoC. These functions include managing “for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act” and preserving natural and historic heritage for future generations.⁶¹⁸ Each of the different statutes that publicly owned land is administered under set out a range of different “roles and responsibilities” for DoC to meet.⁶¹⁹ However since its inception DoC has been under-resourced to manage New Zealand’s conservation estate.⁶²⁰

The Reserves Act is one of the other main statutes administered by the Department of Conservation under which public conservation land may be classified. One of the significant advantages of classification under the Reserves Act is that reserves status is hard to overturn.⁶²¹ The purpose of the Act is:⁶²²

- (a) Providing, for the preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing—
 - (i) Recreational use or potential, whether active or passive; or
 - (ii) Wildlife; or
 - (iii) Indigenous flora or fauna; or
 - (iv) Environmental and landscape amenity or interest; or
 - (v) Natural, scenic, historic, cultural, archaeological, biological, geological, scientific, educational, community, or other special features or value;
- (b) Ensuring, as far as possible, the survival of all indigenous species of flora and fauna, both rare and commonplace, in their natural communities and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscape which in the aggregate originally gave New Zealand its own recognisable character;
- (c) Ensuring, as far as possible, the preservation of access for the public to and along the sea coast, its bays and inlets and offshore islands, lakeshores, and riverbanks, and fostering and promoting the preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development.

⁶¹⁷ Meeting with Jack de Thierry, Department of Conservation, 09/05/07.

⁶¹⁸ Conservation Act 1987, s 6.

⁶¹⁹ Office of the Auditor General, *supra* n 612 at 25.

⁶²⁰ Ericksen, Berke, Crawford, and Dixon, *supra* n 549 at 17.

⁶²¹ Meeting with Dr Bruce Clarkson, University of Waikato, 03/09/07.

⁶²² Reserves Act 1977, s 3.

Under s 16 of the Act the Minister of Conservation must classify reserves according to their principal or primary purpose as defined in sections 17-23. These classifications include; recreational reserves, reserves for the purpose of protecting historic heritage, scenic reserves, nature reserves, scientific reserves and finally reserves for government or local purposes. As will be discussed below the reserves status of the land can affect how the land is to be managed and can have varying impacts on CCGs.

(b) The Issues

One of the first issues that are important to address is that when the statutes cited above were drafted it was probably not considered that community groups would be managing crown owned land. As a result community management of resources has not really been considered in the legislation.⁶²³ Dr Bruce Clarkson, who has been heavily involved in Waikato restoration projects including the large scale restoration occurring at Waiwhakareke in Hamilton, suggested that it would be of assistance if these statutes were amended to incorporate community co-management with government land managers into conservation legislation. Nancy Jensen of Otorohanga Zoological Society also said that the legislation needs to make it clearer who is responsible for consultation with tangata whenua as planning documents and Statutes often specify the need to consult with tangata whenua but do not make it clear whether this duty is to be placed on groups or on the government agencies administering the Acts.⁶²⁴

Another of the major issues with publicly protected land is that much of the land that has been set aside in public reserves and parks is that it is not representative of New Zealand's full range of natural ecosystems. Much of the land was not reserved because of its high ecological value but because it was not suitable for farming. This means that many of New Zealand's pristine ecosystems are those in highly mountainous areas.⁶²⁵ By failing to ensure that the conservation estate is

⁶²³ Meeting with Dr Bruce Clarkson, University of Waikato, 03/09/07.

⁶²⁴ Meeting with Nancy Jensen, Otorohanga Zoological Society, 17/05/07

⁶²⁵ Ministry for the Environment, *supra* n 24 at 143.

representative of the full range of New Zealand ecosystems the Department of Conservation and the New Zealand government are failing to give effect to section 3 of the Reserves Act which provides that the “original” character of New Zealand’s ecosystems should be preserved.⁶²⁶ Also in some areas the classifications of protection that have been allocated to certain areas by DoC do not adequately represent the conservation value of the area.⁶²⁷ The Auditor-General recommends that in some places it would be beneficial for DoC to review the classifications they have allocated to the land and to upgrade them accordingly.⁶²⁸

One of the other issues identified during the interview process was how the statutory designation of land impacts upon the ability of a group to successfully restore an area. Dr Bruce Clarkson said that there are a number of ways that the status of the land can affect groups. Firstly, it is not always clear what authority a group has when they are working on a particular project. For example, at Maungatautari the land is designated under the Reserves Act and there is a formal acceptance that Maungatautari Ecological Island Trust is to be the main group restoring the mountain. However it is not clear whether this gives the group jurisdiction to tell other groups, who may wish to undertake restoration on the mountain, what to do. Clarkson suggests that it would be useful if there was more clarity in this respect so that it is clear exactly how the status of the land affects what a group can do.⁶²⁹ Diane Campbell-Hunt of Orokonui Ecosanctuary in the Otago Region said that in order to make management clearer their group has entered into an agreement with DoC which allows the group to manage the land. However Diane is concerned that even though they have agreed with DoC that Orokonui is responsible for managing the land at present the fifty year lifespan of the agreement means that there may be uncertainty in the future when the agreement has to be renewed.⁶³⁰

⁶²⁶ Craig, Anderson, Clout, Crease, Mitchell, Ogden, Roberts, and Ussher, *supra* n 2 at 66.

⁶²⁷ Office of the Auditor General, *supra* n 612 at 47.

⁶²⁸ *Ibid* 47-48.

⁶²⁹ Meeting with Dr Bruce Clarkson, University of Waikato, 03/09/07.

⁶³⁰ Meeting with Diane Campbell-Hunt, Orokonui Ecosanctuary, 05/12/07.

Land status can also affect funding. Where land is crown owned and managed there is a presumption by some funding agencies that the group should be funded by the agency responsible for the land. For example, both Hakarimata Restoration Trust and Te Kauri-Waikuku Trust have experienced difficulties in obtaining funding because of the presumption that groups working on DoC land should be DoC funded.⁶³¹ Keith Thompson and Rachael Goddard of Te Kauri-Waikuku Trust said that the reserves status of the land that they are working on has majorly limited the amount of funding that they are able to get as sources such as the Sustainable Management Fund will not provide funding to groups working on DoC administered land. Similarly Diane Campbell-Hunt from Orokonui Ecosanctuary said that the scenic reserve status of their land has limited the ability of the group to generate funds because the group cannot charge entry fees to the public to help recoup their costs.⁶³² Because of the fact that DoC is unable to manage its estate without CCG assistance it would be helpful if these funding barriers like these were to be removed.

One final issue that I would like to address in relation to groups that undertake restoration work on public land is consultation with the tangata whenua of the area for whom the land may have cultural and historical significance. Section 4 of the Conservation Act requires that the Act should be “interpreted and administered to give effect to the principles of the Treaty of Waitangi”. This requirement also applies to the other legislation administered by DoC.⁶³³ Section 4 of the Conservation Act is the strongest provision for the recognition of Maori interests in New Zealand environmental legislation as it requires that the Act be interpreted and administered to “give effect to” the principles of the Treaty of Waitangi.⁶³⁴ Therefore the consideration of Maori interests is of great importance when groups are conducting work on land that is administered under the Conservation Act.

⁶³¹ Meeting with Dr Bruce Clarkson, University of Waikato, 03/09/07; and telephone conversation with Rachael Goddard, Te Kauri-Waikuku Trust, 27/07/07.

⁶³² Meeting with Diane Campbell-Hunt, Orokonui Ecosanctuary, 05/12/07.

⁶³³ Conservation Act 1987, s 6.

⁶³⁴ J. Ruru, “Managing Our Treasured Home: The Conservation Estate and the Principles of the Treaty of Waitangi” (2004) 8 NZJEL 243, 243.

Under the RMA provision has also been made to ensure that Maori interests are taken into account in activities concerning the management of natural, physical and cultural resources. Section 5 of the Act requires resources to be managed in a way that allows “people and communities to provide for their social, economic, and cultural wellbeing”. Section 6(e) considers “the relationship of Maori and their culture and traditions with their lands, water, sites, waahi tapu, and other taonga” to be a matter of national importance. Section 7 requires “persons exercising functions and powers” under the Act to “have particular regard to” Kaitiakitanga. Under s 8 “persons exercising functions and powers” under the Act must also “take into account the principles of the Treaty of Waitangi”. In *New Zealand Maori Council v Attorney General* the principles of the Treaty were defined as meaning “the underlying mutual obligations and responsibilities which the Treaty places on the parties”.⁶³⁵ One of the principles of the Treaty is that of partnership. This principle reflects the idea that the treaty was to create a partnership between Maori and the Crown and “requires that the Crown and Maori act towards each other reasonably and with the utmost good faith”.⁶³⁶

Nancy Jensen of Otorohanga Zoological Society says that it can sometimes be hard for groups to determine whether it should be DoC or the CCG carrying out the work that should be responsible for consultation.⁶³⁷ It appears from my research that most groups err on the side of caution choosing to consult with Maori. Most of the people that I spoke to in the course of interviews thought that consultation with local tangata whenua was an important consideration when undertaking restoration projects and had either undertaken consultation or attempted to. One of the key points that several of the people I spoke to made was the importance of consulting tangata whenua early on in the project, preferably as part of the planning phases. Consulting Maori early in on the process helps to ensure that the group maintains a good relationship with tangata whenua and Judy van Rossem, of Environment Waikato, says that in most instances Iwi are happy to see groups getting on with the work provided they have

⁶³⁵ *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513, 517.

⁶³⁶ New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (2001) 80.

⁶³⁷ Meeting with Nancy Jensen, Otorohanga Zoological Society, 17/05/07.

been consulted first.⁶³⁸ Wayne Todd of Moehau Environment Group said that one of the issues that they had in dealing with local Maori was that their group went to speak to the Hauraki Maori Trust board when they had already developed their plans for the project which led some in the Maori community to feel that the majority of the decisions about the project had already been made without any Maori input.⁶³⁹ Bruce Clarkson said that there was an issue for Maungatautari Ecological Island Trust which resulted in them having to develop two enclosures on Maungatautari as they had chosen to consult with Iwi on one side of the mountain and not the other.⁶⁴⁰ This shows the importance of taking into account all Maori interest groups.

C. Conclusions

While New Zealand's current legislation provides limited protection for restoration sites on private land there is much to be learnt from the experiences of overseas jurisdictions which, if applied in New Zealand, could greatly strengthen the protection provided on private land. As can be seen from the innovative approaches taken in Australia limited funding can be wisely used by either funding protection through revolving funds or by requiring landowners to compete for funding in a market situation so that conservation is achieved for an economically competitive price. Rethinking the mechanisms currently used could also significantly improve the fate of biodiversity on private land and may help to make the legal environment more favourable for CCGs. One of the key mechanisms which I believe would be extremely valuable in the New Zealand context are conservation easements. In my opinion the experiences of United States CCGs demonstrate the value of statutory conservation easements to CCGs and the results that CCGs in these countries have achieved on private land speak for themselves. New Zealand would be wise to adopt legislation similar to the United States Uniform Conservation Act if we are to facilitate increased CCG participation in the management of private land to reduce the burden on already oversubscribed organisations such as QEII Trust.

⁶³⁸ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

⁶³⁹ Meeting with Wayne Todd, Moehau Environment Group, 02/05/07.

⁶⁴⁰ Meeting with Bruce Clarkson, University of Waikato, 03/09/07.

In relation to publicly owned land the Department of Conservation is currently only able to manage a small percentage of New Zealand's total conservation estate. CCGs provide significant assistance to DoC by undertaking additional work on parts of the conservation estate where DoC is currently unable to undertake the necessary work. However despite the fact that CCGs are providing a significant amount of assistance to the Department the current legal framework does not make it easy for CCGs to manage the publicly owned land. To assist CCGs in their work it is necessary for the status of their management powers on public land to be defined and for provision to be made so that groups are able to gain access to additional funding to help them cover the costs of the work that they do. This may be as simple as providing groups with authorisation to charge entry fees to the public when they visit the restoration site.

D. Local Authorities, Policies, and Plans

“Local Government is the most important player when it comes to protecting biodiversity because it administers the legislation that affects landowners and is accountable to the people for the environmental conditions in which they live.”

V. Forgie, P. Horsley, and J. Johnston, *Facilitating Community-based Conservation Initiatives* (2001) 59.

Local authorities have a key role to play in assisting the facilitation of successful community conservation projects and under the RMA a significant proportion of the responsibility for managing environmental policies has been shifted from central government to district and regional councils.⁶⁴¹ The councils can assist directly by providing funding, assistance, and advice, or indirectly through the creation of policies and plans that are favourable to community based conservation. As the level of government closest to the community local authorities are also in a better position

⁶⁴¹ K. Palmer “Resource Management Act 1991” in D. Nolan (ed.), *Environmental and Resource Management Law* (2005) 159.

to judge the needs of the local community and to identify environmental issues in their locality.⁶⁴²

Regional and district councils are one of the key policy making bodies that exert influence over land in a way that can affect the management of restoration projects through regulation. Under s 30 of the RMA regional councils are required to establish, implement, and review “objectives, policies and methods to achieve integrated management of the natural and physical resources of the region”. Similarly, s 31 empowers territorial authorities to manage “the effects of the use, development and protection of land”. In pursuance of the objectives of the RMA and the objectives and policies of their plan regional councils are given the authority to make rules.⁶⁴³ Similar powers are given to district councils under s 76.⁶⁴⁴ On this basis it is clear that it is well within the jurisdiction of both regional and territorial authorities to regulate changes to landowner behaviour in a way that allows for increased protection of biodiversity on private land. This power, however, is not absolute, and is limited by both s 32 of the RMA and the first schedule. Schedule One of the RMA sets out the conditions that an authority must abide by in the “preparation and change of policy statements and plans”. These include the requirement that authorities receive submissions on a proposed plan and undertake public consultation.⁶⁴⁵ Section 32 also limits the ability of councils to regulate under the RMA by requiring authorities to consider “alternatives, benefits and costs” before notifying the plan. These requirements mean that the local authorities are not given an unfettered jurisdiction to make plans however they see fit but that there is ample opportunity for the interests of the public to be considered throughout the plan making processes.

⁶⁴² Randolph, *supra* n 40 at 75.

⁶⁴³ Resource Management Act 1991, s 68.

⁶⁴⁴ *Ibid*, s 76.

⁶⁴⁵ *Ibid*, Schedule 1.

Section 9 of the RMA states that “No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan”. Use is defined in s 9(4) as including:

... (c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land.

Section 9 is important as it means that local and regional authorities have a significant ability to limit negative impacts on biodiversity within their locality.⁶⁴⁶ For example, councils can make provision in their plans for the protection of areas of significant vegetation which allows specific sites to be protected under a plan.⁶⁴⁷ However on the other hand s 9 also means that there is a presumption that any use of land that is not prohibited in a plan is allowed.⁶⁴⁸

Another important role is in the establishment of regional biodiversity forums, such as Waikato Biodiversity Forum, which help to “make local participation possible”.⁶⁴⁹ The two main forms of local authority in New Zealand are local councils (territorial authorities) and regional councils. Regional council boundaries in New Zealand are catchment based therefore regional authorities usually have the responsibility for the management of waterways. They are also responsible for the management of air and, to a certain degree, land. Because of their closeness to the local community local councils have been given the responsibility of regulating for subdivision and land use.⁶⁵⁰

1. The Issues:

While the majority of groups have said that their relationship with local authorities such as Environment Waikato, Waikato District Council, and Waipa District Council, have been positive, there have been some instances where groups have found elements of their relationships with the local authorities to be difficult. One of the

⁶⁴⁶ U. Klein, “Integrated Resource Management in New Zealand – A Juridicial Analysis of Policy, Plan and Rule Making Under the RMA” (2001) 5 NZJEL 1, 24.

⁶⁴⁷ Palmer, *supra* n 641 at 189.

⁶⁴⁸ D. Kirkpatrick “Land Use and Subdivision – Resource Consent Procedures, Designations and Appeals” in D. Nolan (ed.), *Environmental and Resource Management Law* (2005)

⁶⁴⁹ Voigt, *supra* n 302 at 201.

⁶⁵⁰ Ericksen, Berke, Crawford, and Dixon, *supra* n 549 at 32-33.

criticisms of local authorities was that there is often a lack of consistency from council staff. Some groups have found that the answers can change depending on who they speak to at the council and this can make it hard to determine what groups can and cannot do on the land they are working on.⁶⁵¹ Pirongia Te Aroaro O Kahu Restoration Society has found that on a number of occasion's submissions or applications prepared according to the instructions of one council employee have not been satisfactory to others. This has meant that documents have had to be rewritten and resubmitted which is time consuming and frustrating, particularly as the majority of CCG members are working for the group on a voluntary basis.⁶⁵² Groups also find it frustrating and time wasting having to re-explain their activities every time staff members in government departments and councils change.⁶⁵³ It would be helpful for groups if all councils and government authorities involved with CCGs had one specific person dedicated to working with a particular group so that groups would be able to have continuity in their dealings with public bodies.⁶⁵⁴ It is also important that there are better policies in place for the handing over of information when staff change so that new staff are brought up to speed on the activities of groups that they will be dealing with. This would help to overcome the issues groups currently have with having to re-explain their activities.⁶⁵⁵

Keith Thompson of Te Kauri-Waikuku Trust said that difficulties can also occur when councils change and new board members are not environmentally conscious. He said that such as issue has arisen in the Waikato. Environment Waikato previously had a board that was knowledgeable in environmental issues and under that board good environmental management had occurred. He said that when the new council board was elected six out of seven board members were chosen from the rates relief group. The issue with this has been that in order to reduce rates council expenditure has had to be cut. This has meant that the amount of money available for

⁶⁵¹ Meetings with Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07; Dr Michael Becker, Waitetuna Streamcare Group, 02/08/07.

⁶⁵² Meeting with Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

⁶⁵³ Wilson, *supra* n 26 at 32.

⁶⁵⁴ Forgie, Horsley, and Johnston, *supra* n 15 at 44.

⁶⁵⁵ Wilson, *supra* n 26 at 32.

environmental management has been reduced. Secondly, the board has needed to be educated on environmental matters and this means that in the meantime it has been difficult for good environmental management to occur. He said that this had significantly set back environmental management in the Waikato region.⁶⁵⁶ Keith said that from an ecological point of view “see-saws” in politics, such as those that have been occurring in the Waikato region in relation to Environment Waikato, can be devastating for ecological restoration projects as for restoration to be successful there need to be consistency.

Staffing levels in councils also affect the quality of district and regional plans. Some councils in New Zealand are significantly understaffed and under resourced therefore are unable to create plans of the quality that was intended when the RMA was enacted. In research by Ericksen et al it was found that low planning staff numbers in councils throughout New Zealand means that the quality of many district plans is quite low. For example, several of the district plans in the Waikato region, including South Waikato, Waikato, Otorohanga, and Matamata-Piako scored less than 50 percent in the study’s plan evaluation. Evaluation criteria included the inclusion and effectiveness of monitoring provisions, integration with other planning instruments, and clarity of purpose.⁶⁵⁷ In the study respondents from local councils said that they were “at the limits of what could be achieved” with the resources they had.⁶⁵⁸ In an interview that I conducted with an environmental policy analyst from Hamilton City Council I made similar findings.⁶⁵⁹ In addition to this a lack of resources in councils means that community consultation does not always occur at desirable levels therefore it can be hard to councils to adequately plan for community needs.⁶⁶⁰ Linking this back to the theories that I discussed earlier on deliberative democracy and public participation it can be argued that by failing to undertake adequate consultation councils are failing to adequately provide for civil society in their

⁶⁵⁶ Meeting with Keith Thompson, Te Kauri-Waikuku Trust, 11/12/07.

⁶⁵⁷ Ericksen, Berke, Crawford, and Dixon, *supra* n 549 at 138-139.

⁶⁵⁸ *Ibid*, 137-140.

⁶⁵⁹ Meeting with Tim Newton, Hamilton City Council, 04/12/07.

⁶⁶⁰ Ericksen, Berke, Crawford, and Dixon, *supra* n 549 at 28; Meeting with Tim Newton, Hamilton City Council, 04/12/07.

planning. Part of ensuring successful local government involvement in ecological restoration and in the creation and implementation of land use planning that takes into account biodiversity issues is to ensure that local government has an adequate resource base. To ensure local councils are achieving their obligations under the RMA central government needs to provide additional support to councils which are struggling to create plans of a standard that will achieve good environmental results.⁶⁶¹

Another issue is the lack of integration between councils. Regional and territorial councils are required, under sections 30 and 31 of the RMA, to manage natural and physical resources in an integrated way. The RMA also requires cooperation between councils in the development of their plans as ecosystems are not always confined to political boundaries but may cross regional and territorial authority boundaries.⁶⁶² Under s 66(2)(d) regional councils are required to ensure that there is consistency between their plan and those of adjacent regional councils. Similarly under s 74(2) territorial authorities are required to ensure that their plans are consistent with those of neighbouring territorial authorities. Therefore the lack of integration between the councils in some areas means that local and regional authorities are failing to comply with the duties placed on them by the RMA and further cooperation between councils is required to prevent groups having to deal with conflicting planning instruments on restoration sites that lie on the border of one or more territorial or regional authority.⁶⁶³ However the Act itself provides no mechanisms for ensuring that the approaches of neighbouring councils are consistent therefore the provisions of the Act are also to blame in this respect and amendment is necessary if integrated resource management planning is to be achieved.⁶⁶⁴ Increased interaction between different levels of government would result in better overall management of biodiversity. Keith Thompson of Te Kauri-Waikuku Trust, who is also a retired ecologist, said that collaboration between the different levels of local government is especially important

⁶⁶¹ Ericksen, Berke, Crawford, and Dixon, *supra* n 549 at 17.

⁶⁶² Ministry for the Environment, *supra* n 283 at 20.

⁶⁶³ Klein, *supra* n 646 at 31.

⁶⁶⁴ *Ibid*, 30.

in relation to wetlands which are somewhere between the jurisdictions of both regional and district councils because of the combination of water and land management factors that affect wetland management.⁶⁶⁵

One other important change that needs to occur in order to achieve better restoration results is for local government bodies to undertake environmental planning on a long term scale. At present planning occurs on short time frames, often only four to ten years. Ecological time scales are long term, decades and centuries. Keith Thompson said that from an ecological point of view the current time scales used for environmental planning are not suitable and to achieve better environmental results it is necessary for legal systems to be altered to take better consideration of ecological timescales.⁶⁶⁶

Submission writing and attendance at council hearings was another area which some groups were concerned about. Several interview participants cited the importance of groups being active in making submissions to councils in respect to long term council community plans (LTCCPs), district and regional plans, resource consent applications, and other management plans, as not only may groups be able to impact upon the planning process through submissions⁶⁶⁷ but there is also potential for them to have the groups needs recognised in local planning instruments or prevent actions being taken that could negatively impact upon the group's activities.⁶⁶⁸ Making submissions to local authorities can help to raise the groups profile in the area and if submissions are well drafted it can help to show the group is organised therefore raises their credibility to those in the council who will be making the decisions affecting a group.⁶⁶⁹ It is important that groups are able to have input into the public planning process so that they are able to make their needs known to the local

⁶⁶⁵ Meeting with Keith Thompson, Te Kauri-Waikuku Trust, 11/12/07.

⁶⁶⁶ Ibid.

⁶⁶⁷ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

⁶⁶⁸ Ericksen, Berke, Crawford, and Dixon, *supra* n 549 at 124.

⁶⁶⁹ K. Chapple and N. Sutherland, "Participating in Public Processes" in R. Harris (ed.) *Handbook of Environmental Law* (2004) 36.

authorities,⁶⁷⁰ and if groups make submissions at the planning stage it is easier to have their interests considered than once the relevant policies are in place.⁶⁷¹

However, it can be difficult for groups to be able to grasp the content of plans and to be able to make effective submissions against them;⁶⁷² it is also hard for groups to know how to go about writing submissions against resource consent applications which are contrary to the group's activities.⁶⁷³ It was suggested in the course of interviewing by several participants that it would be of great assistance to groups if there was a service where groups could go to get low cost advice about how to best go about writing successful submissions.⁶⁷⁴ Another issue in relation to the council planning processes was the fact that in order to be able to make submissions and attend council hearings, group members need to be able to find the time in addition to their employment to do these activities and that this can restrict the amount of time that they can spend on this.⁶⁷⁵ Council hearings are also usually during working hours which means that in many cases group members either must take time out from their work or are unable to attend.⁶⁷⁶

Raewyn Peart of the Environmental Defence Society (EDS) said that in her experience CCGs often only get involved in RMA processes when a development threatens their work, either because the group was not formed under after the regional or district plans were put in place, or because groups do not have knowledge about the plan making process. This can mean that certain activities, which are contrary to restoration, are permitted under the plan and there is little that a group can do about it. Often the policies that affect a group have been put in place years before the group is affected by them. If groups become involved during the plan making process they are

⁶⁷⁰ Forgie, Horsley, and Johnston, *supra* n 15 at 12.

⁶⁷¹ Chapple and Sutherland, *supra* n 669 at 36.

⁶⁷² Meeting with Raewyn Peart, Environmental Defence Society, 18/09/07.

⁶⁷³ Meeting with Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07.

⁶⁷⁴ Meetings with: Judy van Rossem (Environment Waikato), Moira Cursey (Waikato Biodiversity Forum), and Jan Hoverd (Biodiversity Advice Waikato), 08/05/07; Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

⁶⁷⁵ Meeting with Wendy Jon, Friends of Oakley Creek, 14/05/07.

⁶⁷⁶ Meeting with Dr Michael Becker, Waitetuna Streamcare Group, 02/08/07.

able to have a greater impact on the way that the rules are made and have better standing to oppose them if the plan is approved and they have made submissions against it.⁶⁷⁷

2. Land Use Zoning

Another area where there is potential for increased protection through regulation is in relation to land use planning by local councils. It is possible for local councils to place rules in plans about the protection of certain areas of vegetation, or to re-zone certain areas in a district specifically for the purposes of conservation.⁶⁷⁸ Restoration activities can be incorporated into planning by local authorities. For example, provision could be made in council planning to zone certain areas for restoration. In Hamilton City a gully restoration zone has been created with the aim of protecting Hamilton's significant gully system from development. While this zone does not provide the level of protection that may be achieved by covenanting or reserves status it does help to protect the gullies from development to a certain extent.⁶⁷⁹

Where land uses exist that are incompatible with restoration it can restrict the activities of CCGs in a way which can limit the effectiveness of their restoration project. Urban encroachment into areas significant to biodiversity protection, including restoration sites, is a significant threat, particularly as Hamilton City and other New Zealand towns and cities continue to expand. The desire of many city workers to live on the periphery of cities places increasing threat on nature as housing development begins to encroach on native habitat close to urban areas. Land use planning is an important part of protecting native habitats in this respect as it can help to ensure that development is located away from areas that require protection.⁶⁸⁰ Good land use planning can help to facilitate biodiversity conservation and ecological restoration. For example, through the provision of green corridors in long term

⁶⁷⁷ Meeting with Raewyn Peart, Environmental Defence Society, 18/09/07.

⁶⁷⁸ Binning and Young, *supra* n 377 at 41-42.

⁶⁷⁹ B.D. Clarkson, "Ecological Restoration in Hamilton City" in *Greening the City: Bringing Biodiversity Back into the Urban Environment: Proceedings of a Conference Held by the Royal New Zealand Institute of Horticulture* (2005) 94.

⁶⁸⁰ Brown, *supra* n 11 at 230-231.

development planning green spaces can be preserved and greenways can be allowed to develop so that plant and animal life can move between larger ecosystems even as development of urban areas expand.⁶⁸¹ This can help to ensure that habitats of native flora and fauna do not become too fragmented and can help to ensure their long term survival.⁶⁸²

Agricultural land uses surrounding restoration sites can lead to increased nutrient input into a site and affect a projects success by increasing the presence of weeds and degrading waterways.⁶⁸³ For example, in Waipa District there have been difficulties in achieving effective restoration of peat lakes because the current land use zoning is not compatible with the restoration activities.⁶⁸⁴ Land use controls could be used to protect these areas from development by restricting what activities can occur on the land surrounding conservation areas.⁶⁸⁵ For example, in Brisbane City some areas were rezoned to restrict the amount of development that can occur in areas deemed to be important for conservation purposes.⁶⁸⁶ To help ensure protection of restoration sites land-use zoning must be modified to be sympathetic to the needs of regenerating ecosystems.⁶⁸⁷

3. Applying for Resource Consents

One of the issues identified during the interview process was the difficulty and expense of obtaining resource consents for community projects. Don Scarlet, who is involved in the National Wetland Trust and Waikato Catchment Ecological Enhancement Trust, provided me with a useful example of a situation where resource consent conditions have hindered a project proposed on private land. He said that the farmer involved is enthusiastic and is willing to put his own time and money into the project but has become frustrated because of the consent process that he has had to go

⁶⁸¹ Randolph, *supra* n 40 at 75.

⁶⁸² *Ibid*, 569.

⁶⁸³ Ministry for the Environment, *supra* n 24 at 148.

⁶⁸⁴ T. Roxburgh, *Waipa Peat Lakes: Restoration Difficulties in Intensively Farmed Catchments* (Presentation at Conserv-vision Conference, University of Waikato, 5 July 2007).

⁶⁸⁵ Platt, *supra* n 399 at 110.

⁶⁸⁶ Binning and Young, *supra* n 377 at 42.

⁶⁸⁷ Ministry for the Environment, *supra* n 24 at 154.

through to implement the activity. Don said that under the Waikato regional plan there is a requirement that an engineer design and supervise the construction of a series of small dams that need to be constructed as part of the project. He said that the farmer always intended doing the work this way and he feels cheated that he has to now pay the costs of the engineer. Don said that this has not been the first time that he has come across issues like this and that this is a problem as it can have the effect of discouraging landowners' goodwill. Don said that this example shows how regional plans could be altered to be more efficient and make restoration projects run more smoothly. He said that Environment Bay of Plenty's (EBoP) has a useful model that may be a good template for Environment Waikato to use in considering changes to its regional plan because EBoP makes allowances for community projects by reducing the levels of bureaucracy that they need to comply with.⁶⁸⁸ For example, Rule 1D of EBoP's Proposed Regional Water and Land Plan states that "Earthworks and vegetation disturbance on coastal margins and sand dune country for coast care works" is a permitted activity where the formal approval of EBoP has been sought.⁶⁸⁹

Jim Mylchreest of Maungatautari Ecological Island Trust said that while their resource consent applications were dealt with efficiently by Environment Waikato, there were high costs associated with gaining resource consents for the building of the pest proof fence surrounding the sanctuary, for poison drops, and for building culverts and streams. Jim said that in the case of CCGs councils should be prepared to waive fees because the work being done is in the public benefit.⁶⁹⁰ Clare St Pierre of Pirongia Te Aroaro O Kahu Restoration Society said that some councils do waive fees for resource consents however they often do not tell groups this when they apply for resource consents.⁶⁹¹

Again these examples show how New Zealand law is failing to provide for CCGs. Without substantial modification to planning instruments and council policies on

⁶⁸⁸ Meeting with Don Scarlet, Waikato Catchment Ecological Enhancement Trust/ National Wetlands Trust, 05/09/07.

⁶⁸⁹ Environment Bay of Plenty, *Proposed Regional Land and Water Plan* (2007) 177.

⁶⁹⁰ Meeting with Jim Mylchreest, Maungatautari Ecological Island Trust, 14/06/07.

⁶⁹¹ Clare St Pierre, Pirongia Te Aroaro O Kahu Restoration Society, 14/06/07.

resource consent applications the consent process could be made significantly simpler for CCGs. This is important as, as is shown by the examples from Don Scarlet and Jim Mylchreest, current approaches of councils can discourage groups who are ultimately trying to do work that should be being carried out by councils or government departments.

4. Conclusions

As the level of government closest to the community local authorities have the ability to work closely with CCGs to ensure the success of restoration projects. By modifying council approaches to land use planning and resource consent processes as discussed above councils could greatly improve the ability of CCGs to undertake work in their localities. In my opinion it would be wise for council planning scales to be extended to take better consideration of ecological time frames as suggested by Keith Thompson. It is important therefore, that there is consistency even when council boards change.

Another point that I think that it is also important that there is greater integration between different councils within a region as ecosystems are not confined to political boundaries but are spread over larger areas. Without increased levels of interaction it can be hard to manage ecosystems in a comprehensive way. Finally, it is important that local councils are provided with the resources that they require to undertake good management planning as, as explained above with reference to the study of Ericksen et al, without adequate resources the planning instruments that manage the use of natural resources may be poorly drafted and therefore may fail to provide for local ecosystems properly.

PART FOUR: CONCLUSIONS

A. Introduction

As a sector of civil society CCGs not only help to represent New Zealand communities in environmental issues but they also play an increasingly important role in restoring and rehabilitating damaged ecosystems throughout the country. As has been shown throughout the course of this thesis CCGs have often stepped in to fill the gaps where the state has been unable to provide environmental services. Their tireless efforts have contributed to the protection of numerous habitats for native animals and plants and help to maintain New Zealand's distinctive biodiversity. However despite their best efforts legal barriers continue to restrain groups from reaching their full potential.

My research has shown there to be somewhat of a failure on the part of the New Zealand government to adequately provide for civil society organisations, particularly CCGs. While some provision has been made for civil society groups in law, such as creating means for groups to become incorporated, in many ways the needs of civil society have not been properly considered in the development of policy and legislation, particularly that dealing with environmental matters. At the central government level statutes, such as the Reserves and Conservation Acts, have failed to recognise the important role that CCGs play in the management of publicly owned land and therefore have failed to provide for CCGs in a legal sense as can be demonstrated by Bruce Clarkson's example regarding the management status of groups working on publicly owned land.⁶⁹² In a similar manner local government also often fails to adequately provide for CCGs despite arguments that as the level of government closest to CCGs it should be best attuned to understanding CCGs needs.⁶⁹³ Common law barriers continue to exist both with regard to corporate structures and also in relation to potential protection mechanisms such as easements.

⁶⁹² Supra n 631.

⁶⁹³ Randolph, supra n 40 at 75.

Overall this paper has aimed to evaluate how the law applies to and affects community conservation groups undertaking ecosystem restoration with particular reference to the experiences of CCGs in the Waikato Region. What has been achieved has been an assessment of the legal issues experienced by CCGs and identification of areas where the law can be improved to help facilitate improved restoration. I have also endeavoured to highlight some of the successful measures that have been used overseas to facilitate community based conservation in an attempt to provide guidance as to the direction that New Zealand legislative and regulatory policy must follow if CCGs are to thrive. As these overseas examples have shown there is much more that the New Zealand government could do to facilitate ecological restoration by CCGs. This final part of the paper will draw conclusions based on my research findings as explained in the previous chapters.

B. Discussion

1. Corporate Issues

As I have shown in Part Two the corporate structures that are currently available and which groups are widely advised to use do not always meet the needs of community based conservation groups. The law in this area requires modification so that it provides more appropriate mechanisms for use by civil society organisations.⁶⁹⁴ Many of the statutory and common law principles that apply to CCGs were developed over 100 years ago and are in a number of situations no longer suitable for use by a modern civil society. The range of different sized groups means that by continuing to focus on only two main types of structure policy makers are failing to take into account the broad range of needs of a modern civil society.

As my research has shown from examples of policies used overseas, there is much more that can be done to provide for CCGs in New Zealand in the areas of incorporation, management planning, and conflict of interest. The experiences of some of the smaller groups that I interviewed show how better mechanisms need to

⁶⁹⁴ Statement of the Sixteenth Annual John Hopkins International Fellows in Philanthropy Conference Nairobi, Kenya, *supra* n 43 at 4-5.

be put in place to encourage the establishment of formal group structures. By encouraging the use of alternatives to the common structures of incorporated societies and charitable trusts, such as umbrella group structures, policy makers could make the incorporation process substantially less complicated for smaller groups, and prevent them from having to go through the incorporation process individually without the need for major policy reform. Secondly, it would be wise to amend the Incorporated Societies Act as discussed above to allow smaller groups to incorporate with only five or seven members as in Australia. These two options would provide much better opportunities for CCGs to become incorporated and to protect their members from the liabilities faced by unincorporated groups again without the need for substantial amendment to the current legislation. Thirdly, clarification of the charitable position of CCGs that have incorporated under the Charitable Trusts Act is also essential as it would prevent CCGs from having their charitable status challenged in the courts. Because the common law position on whether or not CCGs are charitable in New Zealand is not clear it may be worthwhile for the position to be defined in the Charitable Trusts Act in much the same way as section 5 of the Charities Act 2005 defines what qualifies as a charitable purpose.

The final point that is important to cover is in regard to conflict of interest. The importance of this topic can be demonstrated by the concerns that the groups that I interviewed had about conflict of interest and also by the examples I have discussed from both the New Zealand CCGs that I interviewed where conflict of interest has been a concern, and from the overseas case studies cited in the literature. The conflict of interest issue is one which is very hard to avoid in New Zealand because of the small size of the country. What is not so hard to avoid is allowing a potential conflict of interest to lead to a serious issue for a CCG. My research has shown that further training for members of CCGs, particularly those that are involved in the management of the group, is essential to ensure that members who may have a potential conflict are able to identify the conflict at an early stage so that it can be managed appropriately. Creating an online tutorial for CCGs such as that which is run by the Land Trust Alliance in the United States could help CCG members to

understand their obligations before the issue arise. The other point that is important to emphasise here also is that even without additional training CCGs can limit the potential for conflicts of interest to create an issue by having a conflicts of interest policy that sets out the duties of members to declare interests and whether the interest means the member should step down from the decision or from the board.

2. Land Management

As discussed in Part Three much of the legislation that CCGs are required to operate under was formulated at a time when it was unlikely that Parliament had considered the large role that community groups would play in the management of both publicly and privately owned land. As the involvement of CCGs in land management has increased there has been little amendment to legislation to provide for them. Therefore one of the key changes that this paper has shown to be necessary is the amendment of conservation legislation to take into consideration the increased role that community groups now play in the management of both publicly and privately owned land and resources. Amending legislation such as the Conservation Act and the Reserves Act to take into consideration the role of CCGs in the management of publicly owned land may not only help to clarify status of CCGs in the management of land but could help to remove barriers to restoration. For example, if a general allowance is made to allow CCGs to charge an entry fee to members of the public who visit the site it may allow CCGs to recoup some of their costs. This may allow the group to undertake further work without the need to apply to government agencies for further funding.

There has also been a general lack of willingness on the part of policy makers to interfere with private property rights in order to preserve environmental features. Therefore few inroads have been made in New Zealand legislation to allow CCGs to have a greater level of involvement. While mechanisms such as QEII covenants are somewhat effective at achieving improved ecosystem protection on private land they rely heavily on the goodwill of landowners therefore do not necessarily target highly valuable ecosystems that should be conserved if New Zealand's biological diversity

is to be maintained. They also fail to allow direct involvement of CCGs in the protection of private land. Policy reform in this area is vital to ensure that those ecosystems that are not already safeguarded are maintained and protected in perpetuity for the benefit of future generations and to ensure that the legislation that CCGs operate under takes their interests into consideration. It would be worthwhile amending statutes like the QEII Trust Act to include an option for CCGs to be the holder of a covenant as has occurred in the United States with conservation easements. This would help to ensure that covenants are maintained and enforced in the long term and would give CCGs greater control of the conservation outcomes on the land that they put their time and effort in to managing. It would also give CCGs the option of directly approaching and negotiating with landowners to covenant areas, whereas under the current mechanisms little scope is available for such interactions. To provide a protective backstop regulation should be used in conjunction with the less invasive mechanisms as there will always be at least a small number of landowners whose properties contain ecologically significant sites who will not react unless there are regulatory sanctions in place.⁶⁹⁵ However if regulation is to be effective it is essential that measures are put in place for it to be enforced.

Another important issue that my research has raised is the way that economic factors can create boundaries to ecosystem restoration. Firstly, because the cost of conservation is one of the major deterrents for restoration activities taking place on private land it is important to increase the use of economic incentives to encourage private landowners to become more involved. As the examples I have cited from Australia show, economic incentives can increase the number of landowners willing to undertake conservation work on their land.⁶⁹⁶ In parts of New Zealand where rates relief is not widely used it would be useful for councils to develop a rates relief scheme to complement conservation. Where rates relief would be ineffective or additional funding is required it would be worthwhile to introduce a conservation bidding programme as used with success in Australia. Secondly, because funding is a

⁶⁹⁵ Binning and Young, *supra* n 400 at 32.

⁶⁹⁶ Binning and Young, *supra* n 470 at 13.

major issue for CCGs it would also be useful to develop a revolving scheme such as those used internationally. Similarly, by making low cost loans available groups may be able to access money to undertake urgent work where a group cannot wait for longer term fund raising. Having a revolving land purchase scheme where land is purchased covenanted and sold would also result in increased protection without the government having to invest money in the land in the long term while ensuring that a CCG working on the land has adequate reassurance that the land is protected.

In Part Three, my research has also shown the importance of altering land use zoning so that it is more favourable to ecosystem restoration. As can be seen with the example of the Waipa peat lakes inappropriate land use zoning can have a dramatic impact on the success of restoration projects. If a CCG is to undertake work on land where there is a zoning issue such as that in Waipa it can be exceedingly difficult for them to successfully achieve their aims. By modifying land use zones surrounding restoration sites some of the major barriers to restoration can be removed. It may also be worthwhile developing conservation land use zones in New Zealand similar to those used in Brisbane. Alternatively district councils could make provision for green zones in their long term planning so that fragments of native ecosystems are protected from development as cities and towns continue to spread. As I have discussed previously such provisions can help in the development of green corridors that allow species to travel between larger ecosystems.

3. Additional Recommendations

One of the other points that kept coming up throughout my research was the lack of readily available information about the law and how to go about dealing with responsibilities under the law. In this regard I think that it is essential that there is a place that CCGs can go to for cheap legal advice in the form of a community law centre or similar so that lack of legal advice does not unduly restrain the work of CCGs. From my discussions with CCGs it appears that an online forum through the internet, where information can be stored and experiences can be shared, would be another appropriate step towards ensuring that CCGs have access to legal

information. This would also help to reduce the large amount of time that groups currently spend locating the information that they need from the wide variety of different locations where the information is currently available.

Finally it is important to note that CCGs can themselves have an influence on the policy process and groups must remember that in taking action to make the needs their group known a CCG can help to improve the situation for all CCGs in the area. As demonstrated by Randolph's diagram in Part One there is a reciprocal relationship between civil society and the state therefore it is important that CCGs do not always wait for top down action to be taken. Through political pressure and collaboration with government CCGs can assist in the development of policy that works for them, and as mentioned above, it is important for CCGs to make their needs known to decision makers so that provision can be made for them during planning and decision making phases.⁶⁹⁷ It is harder to bring about change once the laws, policies, or plans are already in place.⁶⁹⁸

C. Concluding Remarks

Working within the current legal framework has been no easy feat for many of New Zealand's community conservation groups. They must be commended for their perseverance and should be rewarded by New Zealand's government through the implementation of changes to New Zealand law to help make restoring ecosystems less difficult. Choosing to adopt recommendations based on overseas experiences as outlined in my conclusions above would be one step towards creating an improved legal environment within which CCGs can operate and help to remove some of the barriers that the law currently creates.

⁶⁹⁷ Randolph, *supra* n 40 at 6.

⁶⁹⁸ Barton, *supra* n 51 at 100.

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